Supreme Court, U.S.
FILED

No. 10-10-468 OCT 6 - 2010

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TRANSCOR AMERICA, LLC, *et al.*,
Petitioners,

v.

KEVIN M. SCHILLING, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

DANIEL P. STRUCK*
EILEEN DENNIS GILBRIDE
NICHOLAS D. ACEDO
JONES, SKELTON & HOCHULI, P.L.C.
2901 North Central Avenue, Suite 800
Phoenix, AZ 85012
(602) 263-1700
DStruck@Jshfirm.com

*Counsel of Record

Counsel for Petitioners

October 6, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Must all (approximately 16,000) putative class members – who are subject to the Prison Litigation Reform Act ("PLRA") – prove that they suffered a physical injury to recover emotional and mental damages, or are the class members exempt from the PLRA's physical injury requirement as long as the named class representative has suffered a physical injury?

2. Can a prisoner conditions of confinement case be certified as a class action under Fed. R. Civ. P. 23(b)(3), if the complaint alleges various constitutional violations based on multiple confinement policies, and each alleged violation can only be determined on a case-by-case basis?

PARTIES TO THE PROCEEDING

Petitioners are TransCor America, LLC, John Smith, and Jeff Brummett. TransCor is a private corporation that contracts with correctional facilities throughout the United States to transport pretrial detainees and prisoners. Smith and Brummett are TransCor employees.

Respondents are former pretrial detainee Kevin M. Schilling, and prisoners John Pinedo and William Tellez. Each were transported by TransCor at some point during their incarceration. Respondents filed this class action lawsuit on behalf of themselves and all of those similarly situated.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, undersigned counsel reports that TransCor America, LLC is a wholly owned subsidiary of Corrections Corporation of America.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE STATEMENT	ii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	8
I. THE DISTRICT COURT CREATED AN EXCEPTION TO THE PLRA'S PHYSICAL INJURY REQUIREMENT THAT DOES NOT AND SHOULD NOT EXIST	8
A. An Exception for Class Members Violates the Statute's Language	8
B. An Exception for Class Members Improperly Enlarges Prisoners' Rights	9
C. An Exception for Class Members Undermines the Statute's Purpose	9
D. An Exception for Class Members Makes Bad Policy	11
II. THE DISTRICT COURT ENDORSED A RULE 23(B)(3) CLASS CERTIFICATION ANALYSIS IN PRISONER CONDITIONS OF CONFINEMENT CASES THAT ELIMINATES THE "PREDOMINANCE" REQUIREMENT	11
CONCLUSION	16

TABLE OF CONTENTS—Continued

Page

APPENDIX

APPENDIX A: District Court Order Granting in Part and Denying in Part Respondents' Motion for Class Certification (February 16, 2010) 1a

APPENDIX B: Ninth Circuit Panel Order Denying the Petition for Permission to Appeal the District Court's Order Granting Class Certification (April 14, 2010) 28a

APPENDIX C: Ninth Circuit Order Denying the Petition for Rehearing En Banc or In the Alternative Motion for Reconsideration Under Circuit Rule 27–10 (July 8, 2010)..... 29a

APPENDIX D: 42 U.S.C. § 1997e 30a

APPENDIX E: Fed. R. Civ. P. 23 ..... 34a

APPENDIX F: Second Amended Complaint.. 42a

TABLE OF AUTHORITIES

CASES Page

Abrams v. Church, No. CV–06–0155–CI, 2008 WL 426501 (E.D. Wash. Feb. 14, 2008) 12
Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) 9, 14, 15
Bell v. Maricopa County Jail Sheriff's Office, No. CV–09–2489–PHX–DGC, 2009 WL 4824752 (D. Ariz. Dec. 9, 2009) 12
Branham v. Meachum, 77 F.3d 626 (2nd Cir. 1996) 12
Cosby v. Purkett, 782 F. Supp. 1324 (E.D. Mo. 1992) 12
Crawford-El v. Britton, 523 U.S. 574 (1998) 9, 10
DeSpain v. Uphoff, 264 F.3d 965 (10th Cir. 2001) 13
Dolberry v. Levine, 567 F. Supp. 2d 413 (W.D.N.Y. 2008) 10
Dunn v. City of Chicago, 231 F.R.D. 367 (N.D. Ill. 2005) 6-7
Flanory v. Bonn, 604 F.3d 249 (6th Cir. 2010) 10, 12
Foster v. Runnels, 554 F.3d 807 (9th Cir. 2009) 12
Geiger v. Jowers, 404 F.3d 371 (5th Cir. 2005) 9
Georgine v. Amchem Products, Inc., 83 F.3d 610 (3rd Cir. 1996) 15
Hamilton v. Conway, No. 03–CV–527–S, 2008 WL 234216 (W.D.N.Y. Jan. 28, 2008) 12

TABLE OF AUTHORITIES—Continued

Page

Harris v. Fleming, 839 F.2d 1232 (7th Cir. 1988) 12
Harris v. Garner, 190 F.3d 1279, *vacated*, 197 F.3d 1057 (11th Cir. 1999), *reinstated in part on reh'g*, 216 F.3d 970 (11th Cir. 2000) 10
Herman v. Holiday, 238 F.3d 660 (5th Cir. 2001) 10
Hutto v. Finney, 437 U.S. 678 (1978) 12, 14
Johnson v. Lewis, 217 F.3d 726 (9th Cir. 2000), *cert. denied*, 532 U.S. 1065 (2001). 13-14
Jones v. Bock, 549 U.S. 199 (2007) 10
Jones v. Goord, 190 F.R.D. 103 (S.D.N.Y. 1999) 7
Jorden v. Arnold, 408 F. Supp. 869 (M.D. Pa. 1976) 12
Kelsey v. County of Schoharie, No. 1:04–CV–299, 2007 WL 603406 (N.D.N.Y. Feb. 21, 2007), *rev'd*, 567 F.3d 54 (2nd Cir. 2009) 5
Klay v. Humana, Inc., 382 F.3d 1241 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005) 14
Liner v. Goord, 196 F.3d 132 (2nd Cir. 1999) 10
Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000) 12
May v. Baldwin, 109 F.3d 557 (9th Cir. 1997) 12
Mitchell v. Horn, 318 F.3d 523 (3rd Cir. 2003) 10
Oliver v. Keller, 289 F.3d 623 (9th Cir. 2002) 10

TABLE OF AUTHORITIES—Continued

	Page
Pendleton v. Housewright, 651 F. Supp. 631 (D. Nev. 1986)	12
Rhodes v. Chapman, 452 U.S. 337 (1981)	13
Schilling v. TransCor Am., LLC, No. C–08–941–SI, 2010 WL 583972 (N.D. Cal. Feb. 16, 2010)	1
Siglar v. Hightower, 112 F.3d 191 (5th Cir. 1997)	10
Sostre v. McGinnis, 442 F.2d 178 (2nd Cir. 1971)	12
Stewart v. Winter, 669 F.2d 328 (5th Cir. 1982)	7
Thomas v. Baca, 231 F.R.D. 397 (C.D. Cal. 2005)	6
Thompson v. Carter, 284 F.3d 411 (2nd Cir. 2002)	9
Turner v. Grant County Det. Ctr., No. 05–148–DLB, 2008 WL 821895 (E.D. Ky. Mar. 26, 2008)	11
Tyler v. Suffolk County, 253 F.R.D. 8 (D. Mass. 2008)	6
Whitnack v. Douglas County, 16 F.3d 954 (8th Cir. 1994)	14
Wilson v. Seiter, 501 U.S. 294 (1991)	14
Woodford v. Ngo, 548 U.S. 81 (2006)	9, 10
Zehner v. Trigg, 952 F. Supp. 1318, *aff'd*, 133 F.3d 459 (7th Cir. 1997)	11

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV	4
U.S. Const. amend. VIII	4
U.S. Const. amend. XIV	4

TABLE OF AUTHORITIES—Continued

Page

STATUTES

28 U.S.C. § 2072(b) 9
42 U.S.C. § 1997e(e) 2, 5, 9, 10, 11
42 U.S.C. § 1997e(h) 8

RULES AND REGULATIONS

Fed. R. Civ. P. 23(b)(3) 2, 4, 5, 13, 14, 15
Fed. R. Civ. P. 23(f) 7
Fed. R. App. P. 35 8
Fed. R. App. P. 35(a)(2) 8
Fed. R. App. P. 35(c) 7
Fed. R. App. P. 40(a)(1) 7
Ninth Circuit Rule 27–10 ..... 7, 8
Ninth Circuit Rule 27–10(a)(2) 7

IN THE

Supreme Court of the United States

No. 10-____

TRANSCOR AMERICA, LLC, *et al.*,
Petitioners,

v.

KEVIN M. SCHILLING, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners TransCor America, LLC, John Smith, and Jeff Brummett respectfully petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' order denying en banc reconsideration is not reported. (Pet. App. 29a.) The underlying panel order denying the petition for permission to appeal the district court's order is not reported. (Pet. App. 28a.) The district court's order granting class certification is reported online at *Schilling v. TransCor Am., LLC*, No. C–08–941–SI, 2010 WL 583972 (N.D. Cal. Feb. 16, 2010). (Pet. App. 1a–27a.)

STATEMENT OF JURISDICTION

The court of appeals' order was entered on April 14, 2010, and it denied en banc reconsideration on July 8, 2010. (Pet. App. 28a–29a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1997e(e) provides: "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." (Pet. App. 30a–33a.)

Fed. R. Civ. P. 23(b)(3), provides, in pertinent part: "A class action may be maintained if Rule 23(a) is satisfied and if . . . the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members . . . ." (Pet. App. 34a–41a.)

STATEMENT OF THE CASE

TransCor America, LLC ("TransCor") is a private corporation that contracts with correctional facilities throughout the United States to transport pretrial detainees and prisoners. Between February 14, 2006 and July 21, 2009, the relevant class period, TransCor transported thousands of prisoners whose transports lasted more than 24 continuous hours. Prisoners in transit for more than 24 hours are transported on 19-, 23-, or 30-passenger transporters. Each transporter is staffed with a four or five person crew, and each crew is assigned to a 5-day transport. During this 5-day trip, prisoners are picked up and dropped off at various correctional facilities.

The transporters are divided into compartments, separated by "security walls," to separate male, female, and juvenile prisoners. Each transporter is tall enough to allow prisoners to stand fully erect, and each is equipped with padded and upholstered high-back bucket seats, flat screen TV's, "extra heaters" and "extra heavy air conditioners," and an enclosed bathroom. Stops are made for bathroom breaks every 3 to 4 hours, and prisoners are also allowed to use the restroom anytime the transporter stops for a pick up or drop off. Prisoners are encouraged to stand up and stretch, and permitted to walk up and down the transporter's aisle, two at a time, during each 30- to 60-minute restroom break. Prisoners in transit are given three fast-food meals a day, and are given water upon request. Prisoners are provided hand sanitizers and hand wipes to use after the bathroom and before eating. For security reasons, prisoners are not allowed to brush their teeth or shave during their transport.

Restraints, including handcuffs, leg irons, and a waist chain, are placed on all prisoners upon boarding. A black box is placed on the cuff holes of the handcuffs to prevent prisoners from picking the locks. An interconnect chain approximately 2 feet long is connected between two prisoners. When the handcuffs and leg irons are applied, at least "one-finger space" is left between the restraint and the prisoner's wrist and ankle. If a prisoner informs a crew member that a restraint is too tight or is causing swelling, the crew member will loosen the restraint. Crew members recheck the handcuffs and leg irons "at least every hour or two" during meal and restroom breaks to ensure that the prisoners' wrists and ankles are not swollen.

Kevin Schilling filed this class action lawsuit against TransCor and two crew members ("Petitioners"), alleging that he was subjected to unlawful conditions during a TransCor transport. The complaint was later amended to add John Pinedo and William Tellez, prisoners whom TransCor had transported at one time or another, as named plaintiffs ("Respondents"). (Pet. App. 42a.) Respondents alleged that TransCor's policies regarding prisoner transport – specifically, "transporting pretrial detainees and prisoners in small metal cages in which a person can neither stand up nor lie down for more than 24 hours at a time while the person is handcuffed, chained, and in shackles, and failing to provide pretrial detainees and prisoners with adequate food, fluids, exercise, hygiene, and medical care" – violated their Fourth, Eighth, and Fourteenth Amendment rights. (*Id.* at 43a.) The complaint requested "compensatory, general, and specific damages for each representative plaintiff and for each member of the class of plaintiffs." (*Id.* at 60a.)

Respondents moved to certify the class and subclass pursuant to Fed. R. Civ. P. 23(b)(3), asserting that two common questions predominated the lawsuit: "what TransCor's policies and practices are" and "whether these policies and procedures violate the Fourth, Eighth, and Fourteenth Amendments to the Constitution." The class was defined to include all pretrial detainees and prisoners who were transported by TransCor for more than 24 hours. (Pet. App. 51a.) A subclass consisted solely of those prisoners transported in California. (*Id.*) The parties believe that the class and subclass ("class") consist of approximately 16,000 prisoners.

Petitioners opposed class certification for several reasons. In challenging the scope and definition of the class, Petitioners argued that since 42 U.S.C. § 1997e(e) precluded prisoners who did not suffer a physical injury as a result of their transport from suing for mental or emotional damages, they could not be included in that portion of the class claim. Respondents, relying on an unpublished decision from the Northern District of New York, *Kelsey v. County of Schoharie*, No. 1:04–CV–299, 2007 WL 603406 (N.D.N.Y. Feb. 21, 2007), *rev'd*, 567 F.3d 54 (2nd Cir. 2009), argued that none of the putative class members had to show a physical injury so long as one of the named plaintiffs suffered a physical injury.

The district court held that, in the absence of any authority explicitly holding that the physical injury requirement applies to class members, "the physical injury requirement is satisfied because the named plaintiffs allege physical injury." (Pet. App. 12a–13a.) The district court believed that this interpretation was "consistent with the intent of the PLRA, because it ensures that the lawsuit is not frivolous, and requiring every class member to meet the physical injury requirement would not reduce prisoner litigation." (*Id.*)

Petitioners also challenged class certification under the "predominance" component of Rule 23(b)(3). Petitioners argued that Respondents' two "common" questions greatly oversimplified the nature of their claims and ignored the individual factual and legal determinations necessary to resolve them. Although identifying TransCor's policies is necessary, whether those policies "violate the Constitution" cannot be resolved on a class wide basis. The real issue, Peti-

tioners argued, is whether the *implementation* of those policies subjected a particular prisoner to unconstitutional conditions, which can be resolved only by assessing the specific conditions of each individual's transport, and then determining whether those conditions violated that individual's constitutional rights. This is because the specific conditions of each transport, and particularly the duration of each, varied widely.

Despite the fact that Respondents were challenging multiple policies (e.g., inadequate food, water, bathroom, exercise, hygiene, and medical care, and excessive use of force) and asserted several constitutional violations (Fourth, Eighth, and Fourteenth Amendments), the district court held that a single question justified class certification on all claims: "Whether inmates who have been transported for more than 24 hours and who are not allowed to sleep overnight have been deprived of something 'sufficiently serious.'"[1] (Pet. App. 19a–23a.) The district court held that "any factual differences in how class members were treated do not defeat certification," citing three district court cases in other jurisdictions that purportedly addressed "similar" claims.[2] (*Id.* at 22a.)

---

[1] The "sleep overnight" aspect refers to TransCor's policy of not stopping at a jail or detention facility every single night to allow the prisoners to sleep in a bed. There is no policy that prohibits the prisoners from sleeping in their seat while on the transporter. And under certain exigent circumstances, for example, bad weather or mechanical problems, the crew will stop at a facility, and allow the prisoners to sleep there overnight.

[2] *Thomas v. Baca*, 231 F.R.D. 397 (C.D. Cal. 2005) (challenging policy of forcing detainees to sleep on cell floors); *Tyler v. Suffolk County*, 253 F.R.D. 8 (D. Mass. 2008) (challenging denial of free access to toilet facilities); *Dunn v. City of Chicago*, 231 F.R.D.

The district court ignored other conditions of confinement cases that refused to grant class certification for precisely the reason Petitioners argued – individual issues on liability greatly outweighed any common issues.[3]

Petitioners sought permission to appeal the district court's order. *See* Fed. R. Civ. P. 23(f). A two-judge panel denied the petition without comment. (Pet. App. 28a.) Petitioners then filed a timely Petition For Rehearing En Banc Or In The Alternative Motion For Reconsideration Under Circuit Rule 27–10. *See* Fed. R. App. P. 35(c) and 40(a)(1); Ninth Circuit Rule 27–10(a)(2).[4] Construing that petition as simply a

---

367 (N.D. Ill. 2005) (alleging that prisoners were subjected to unlawful interrogation room detentions, deprived of adequate accommodations for sleep, and detained more than 48 hours before receiving a judicial hearing). These cases are inapposite because they either involved the constitutionality of a single condition/policy, which *could* be determined by resolution of a single question common to all class members, and/or the individual inquiries did not necessarily touch on the issue of liability, but instead focused on causation and damages.

[3] *Stewart v. Winter*, 669 F.2d 328, 335–38 (5th Cir. 1982) (physical and environmental conditions at county jails were so divergent that it was impossible to state with certainty what common issues could be; district court properly denied certification of class of inmates); *Jones v. Goord*, 190 F.R.D. 103, 113 (S.D.N.Y. 1999) (allowing certification for double-celling challenge, but not allowing certification of damages subclasses; each plaintiff's damages claim would require fact-specific inquiry into the particular circumstances of his injury, if any, and into the reasonableness of defendants' conduct, and nature and gravity of alleged injuries was diverse).

[4] Prior to filing, a member of the Clerk's Office informed Petitioners' counsel that, because the panel issued an "order" and not a "decision," the more appropriate relief was a motion for reconsideration en banc pursuant to Ninth Circuit Rule 27 10. But that Rule required Petitioners to "state with

motion to reconsider en banc the panel's order, the same two-judge panel considered the petition, and denied it on behalf of the court. (Pet. App. 29a.)

REASONS FOR GRANTING THE PETITION

I. THE DISTRICT COURT CREATED AN EXCEPTION TO THE PLRA'S PHYSICAL INJURY REQUIREMENT THAT DOES NOT AND SHOULD NOT EXIST

The district court's ruling improperly authorizes prisoners who are putative class members to sue for mental and emotional damages without having any physical injury. This violates the language of the PLRA, improperly expands prisoners' substantive rights, undermines the statute's purpose, and makes bad policy.

A. An Exception for Class Members Violates the Statute's Language

The physical injury requirement applies to *all* prisoners, and *all* federal civil actions. *See* 42 U.S.C. § 1997e(h) (defining the term "prisoner" to mean "any person" incarcerated or detained who is accused of,

---

particularity the points of law or fact which, in the opinion of the movant, the court has overlooked or misunderstood" – an impossible task given that the panel's order was a denial without any comment. The lack of explanation or analysis in the panel's order prevented Petitioners from ever meeting the standard of Ninth Circuit Rule 27-10. Petitioners therefore sought en banc review under Fed. R. App. P. 35 – which does not prohibit rehearing en banc from an order denying a Rule 5(a) petition for permission to appeal, *see* Fed. R. App. P. 35(a)(2) (en banc rehearing appropriate if "the *proceeding* involves a question of exceptional importance") (emphasis added) – and alternatively en banc reconsideration under Ninth Circuit Rule 27-10 as recommended by the Clerk's Office.

convicted of, sentenced for, or adjudicated delinquent of a crime); *Geiger v. Jowers*, 404 F.3d 371, 375 (5th Cir. 2005) ("Section 1997e(e) applies to all federal civil actions in which a prisoner alleges a constitutional violation."); *Thompson v. Carter*, 284 F.3d 411, 416 (2nd Cir. 2002) (same). The statute does not exempt class actions or putative class members from its ambit.

B. An Exception for Class Members Improperly Enlarges Prisoners' Rights

Interpreting § 1997e(e) to be inapplicable to those prisoners who are putative class members would violate the Rules Enabling Act. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'") (quoting 28 U.S.C. § 2072(b)). Allowing prisoners to recover emotional and mental damages without suffering physical injury simply because they are joined as class members to a class action lawsuit improperly enlarges the rights narrowly conferred to them by the PLRA.

C. An Exception for Class Members Undermines the Statute's Purpose

Congress enacted the PLRA "in the wake of a sharp rise in prisoner litigation in the federal courts." *Woodford v. Ngo*, 548 U.S. 81, 84 (2006). The legislation was intended to "bring this litigation under control," *id.*, and to "discourage prisoners from filing claims that are unlikely to succeed." *Crawford-El v. Britton*, 523 U.S. 574, 596 (1998). Congress included

§ 1997e(e) to further this goal. *See Woodford*, 548 U.S. at 84; *Crawford-El*, 523 U.S. at 596.

Creating an exception for putative class members denigrates the stated purpose of the PLRA to weed out frivolous prisoner lawsuits. *See Jones v. Bock*, 549 U.S. 199, 202, 223 (2007). Allowing prisoners with no physical injury to join in a class seeking emotional and mental damages will exponentially increase the number of potential class members, and consequently *increase*, not reduce, the number of frivolous claims. For instance, in this case, the class is currently estimated to include 16,000 members. Given the nature of the claims alleged – inadequate exercise, bathroom breaks, food, and hygiene – it is difficult to imagine that any of the 16,000 members suffered more than a *de minimus* physical injury, if that.[5] *See, e.g., Oliver*, 289 F.3d at 629 (back and leg pain from sitting and sleeping on benches and on floor was not more than *de minimus*); *Herman v. Holiday*, 238 F.3d 660, 666 (5th Cir. 2001) (prisoner's claim for monetary damages for cold showers, cold food, and lack of adequate clothing barred for failing to allege resulting physical injury); *Dolberry v. Levine*, 567 F. Supp. 2d 413, 418 (W.D.N.Y. 2008) (skin rash due to lack of showers was not more than

---

[5] Although Congress did not specify what constitutes a "physical injury" for PLRA purposes, the circuit courts have uniformly held that the injury must be more than *de minimis*. *See Flanory v. Bonn*, 604 F.3d 249, 254 (6th Cir. 2010); *Mitchell v. Horn*, 318 F.3d 523, 536 (3rd Cir. 2003); *Oliver v. Keller*, 289 F.3d 623, 627 (9th Cir. 2002); *Liner v. Goord*, 196 F.3d 132, 135 (2nd Cir. 1999); *Harris v. Garner*, 190 F.3d 1279, 1286, *vacated*, 197 F.3d 1057 (11th Cir. 1999), *reinstated in part on reh'g*, 216 F.3d 970 (11th Cir. 2000); *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997).

de minimus). Yet the district court's ruling authorizes each one of them to receive monetary damages.

D. An Exception for Class Members Makes Bad Policy

The district court's ruling authorizes non-injured prisoners to find and nominate someone who has suffered a physical injury, and then piggy-back on their claim under the guise of a class action. Congress could not have intended to allow prisoners to so easily side-step its mandate. At least two courts have agreed, and recognized that putative class members must satisfy § 1997e(e)'s physical injury requirement. *See Turner v. Grant County Det. Ctr.*, No. 05–148–DLB, 2008 WL 821895, at *20 (E.D. Ky. Mar. 26, 2008); *Zehner v. Trigg*, 952 F. Supp. 1318, 1327, *aff'd*, 133 F.3d 459, 461 (7th Cir. 1997).

Certiorari is necessary to clarify the applicability of § 1997e(e) to putative class members in a class action lawsuit.

II. THE DISTRICT COURT ENDORSED A RULE 23(B)(3) CLASS CERTIFICATION ANALYSIS IN PRISONER CONDITIONS OF CONFINEMENT CASES THAT ELIMINATES THE "PREDOMINANCE" REQUIREMENT

Sixteen thousand prisoners exposed to vastly different conditions – or even the same condition for vastly differing periods of time – cannot raise a single question of constitutional liability. Each claim must be addressed individually in light of the facts and circumstances surrounding the prisoner's exposure to

the condition, including its duration.[6] The district court ignored the overwhelming individual inquiries

---

[6] *Compare Flanory*, 604 F.3d at 254 (deprivation of toothpaste for 337 days was cruel and unusual); *Foster v. Runnels*, 554 F.3d 807, 812–13 (9th Cir. 2009) (denial of 16 meals in 23 days was sufficiently serious deprivation); *Lopez v. Smith*, 203 F.3d 1122, 1133 (9th Cir. 2000) (deprivation of outdoor exercise for 45 days constituted cruel and unusual punishment); *with May v. Baldwin*, 109 F.3d 557, 565 (9th Cir. 1997) (no Eighth Amendment claim for 3-week deprivation of outdoor exercise where prisoner able to exercise in cell and leave cell for shower); *Branham v. Meachum*, 77 F.3d 626, 630–31 (2nd Cir. 1996) (keeping inmate on lockdown and "full restraint" status without outdoor exercise for a period of approximately 22 days did not violate Eighth Amendment); *Harris v. Fleming*, 839 F.2d 1232, 1234–36 (7th Cir. 1988) (no Eighth Amendment claim for alleged denial of soap, toothbrush, and toothpaste for 10 days without physical injury); *Sostre v. McGinnis*, 442 F.2d 178, 191–94 (2nd Cir. 1971) (shave and shower once per week provided minimally adequate hygiene); *Bell v. Maricopa County Jail Sheriff's Office*, No. CV-09-2489-PHX-DGC, 2009 WL 4824752, at *3 (D. Ariz. Dec. 9, 2009) (no Eighth or Fourteenth Amendment claim for lack of shower for 4 days); *Abrams v. Church*, No. CV-06-0155-CI, 2008 WL 426501, at *7 (E.D. Wash. Feb. 14, 2008) (no Eighth Amendment violation for diet of peanut butter sandwiches for 2 days without consequences to prisoner's health); *Hamilton v. Conway*, No. 03-CV-527-S, 2008 WL 234216, at *9 (W.D.N.Y. Jan. 28, 2008) (denial of a toothbrush and water for bathing to inmate for 48 hours "fails to rise to the level of a constitutional violation because briefly denying hygienic materials does not violate contemporary standards of decency"); *Cosby v. Purkett*, 782 F. Supp. 1324, 1329 (E.D. Mo. 1992) (no Eighth Amendment violation where prisoner was allowed to shower once every 72 hours); *Pendleton v. Housewright*, 651 F. Supp. 631, 634 (D. Nev. 1986) (shower every 3 days adequate); *Jorden v. Arnold*, 408 F. Supp. 869, 876–77 (M.D. Pa. 1976) (Eighth Amendment not violated when inmates only allowed 2 hours of exercise per week); *see also Hutto v. Finney*, 437 U.S. 678, 686–87 (1978) ("A filthy,

necessary to resolve the class members' claims, insisting that "minor variations in inmates' experiences during their transports" should not defeat certification, and certified based on the common fact that all class members had been transported by TransCor for more than 24 hours. The court disregarded the individualized nature of conditions of confinement claims, and eliminated Rule 23(b)(3)'s predominance requirement entirely.

Prisoner conditions of confinement claims are inherently case specific. *See DeSpain v. Uphoff*, 264 F.3d 965, 974 (10th Cir. 2001) ("An inquiry into conditions of confinement by necessity relies on the particular facts of each situation."); *see also Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) ("No static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual."). Whether a prisoner's exposure to a particular condition amounts to a constitutional violation depends largely on the duration of that exposure. *See DeSpain*, 264 F.3d at 974 ("While no single factor controls the outcome of these cases, the length of exposure to the conditions is often of prime importance. . . . In general, . . . minor deprivations suffered for short periods would not rise to an Eighth Amendment violation, while substantial deprivations of shelter, food, drinking water, and sanitation may meet the standard despite a shorter duration.") (internal quotations and citation omitted); *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000) ("The circumstances, nature, and duration of a deprivation of these necessities must be considered in determining whether a constitutional violation has occurred."), *cert. denied*, 532 U.S. 1065

---

overcrowded cell and a diet of 'grue' might be tolerable for a few days and intolerably cruel for weeks or months.").

(2001); *Whitnack v. Douglas County*, 16 F.3d 954, 958 (8th Cir. 1994) ("[T]he length of time required before a constitutional violation is made out decreases as the level of filthiness endured increases."). This Court has acknowledged this seemingly obvious consideration. *See Wilson v. Seiter*, 501 U.S. 294, 300 (1991) ("The long duration of a cruel prison condition may make it easier to establish knowledge and hence some form of intent."); *Hutto*, 437 U.S. at 686–87 ("[T]he length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards.").

These types of cases simply cannot meet Rule 23(b)(3)'s predominance requirement. *See Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004) (if class representative must "introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims, such claims are not suitable for class certification under Rule 23(b)(3)"), *cert. denied*, 543 U.S. 1081 (2005); *see also Amchem*, 521 U.S. at 623 ("predominance" inquiry "trains on the legal or factual questions that qualify each class member's case as a genuine controversy" and "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation"). This case is a perfect example. Schilling's transport lasted 67 hours; Pinedo's lasted approximately 24 hours; and Tellez' lasted 57 hours. Schilling alleges he received two meals per day (one meal on some days), was given water only with meals, and could use the restroom only at the crew's convenience. Pinedo alleges he received three meals per day, was not provided any water, and was permitted to use the restroom only twice. Tellez alleges he received three meals per day, was given water only with meals, and

was permitted to use the restroom four times.[7] No single question can resolve the constitutional issues because the outcome depends on the length and conditions of each trip. The trip's duration will determine whether a prisoner was provided "adequate" food, water, bathroom breaks, and hygiene, and therefore whether a constitutional violation even occurred. Common questions cannot predominate, and the district court's conclusion otherwise conflicts with this Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624–25 (1997) (despite common fact that class members had all been "exposed to asbestos products supplied by the defendants," Rule 23(b)(3) class improper because they were "exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods," and class members suffered different types of injuries or suffered no injury at all) (quoting *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 626 (3rd Cir. 1996)). Similarly, here, the "predominance" inquiry cannot be satisfied simply because the class members had all been transported by TransCor for more than 24 hours.

Certiorari is necessary to establish the correct analysis for these types of conditions of confinement cases.

---

[7] Petitioners deny these allegations, and have documentary evidence to refute them.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL P. STRUCK*
EILEEN DENNIS GILBRIDE
NICHOLAS D. ACEDO
JONES, SKELTON & HOCHULI, P.L.C.
2901 North Central Avenue, Suite 800
Phoenix, AZ 85012
(602) 263-1700
DStruck@JSHfirm.com

*Counsel of Record

Counsel for Petitioners

October 6, 2010

APPENDIX

APPENDIX TABLE OF CONTENTS

	Page
APPENDIX A: District Court Order Granting in Part and Denying in Part Respondents' Motion for Class Certification (February 16, 2010)	1a
APPENDIX B: Ninth Circuit Panel Order Denying the Petition for Permission to Appeal the District Court's Order Granting Class Certification (April 14, 2010)	28a
APPENDIX C: Ninth Circuit Order Denying the Petition for Rehearing En Banc or In the Alternative Motion for Reconsideration Under Circuit Rule 27–10 (July 8, 2010)	29a
APPENDIX D: 42 U.S.C. § 1997e	30a
APPENDIX E: Fed. R. Civ. P. 23	34a
APPENDIX F: Second Amended Complaint	42a

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Filed 02/16/10]

No. C 08-941 SI

KEVIN M. SCHILLING, on behalf of himself and all others similarly situated,
Plaintiff,

v.

TRANSCOR AMERICA, LLC, *et al.*,
Defendants.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

On February 12, 2010, the Court held a hearing on plaintiffs' motion for class certification. For the reasons set forth below, plaintiffs' motion will be GRANTED IN PART and DENIED IN PART.

BACKGROUND

Plaintiffs Kevin Schilling, John Pinedo and William Tellez filed this lawsuit against TransCor America, LLC ("TransCor"). TransCor is a Tennessee corporation licensed to do business in California, whose business entails the transportation of pretrial detainees and prisoners throughout the United States on behalf of federal, state and local governments. Plaintiffs allege

that TransCor transports pretrial detainees and prisoners in conditions that amount to cruel and unusual punishment. Each of the named plaintiffs alleges that he was transported by TransCor for more than 24 hours and subjected to inhumane conditions during his journey, including being shackled and kept in a cage, and deprived of access to regular food, water, and bathrooms. The second amended complaint alleges two class claims for relief: (1) a claim under 42 U.S.C. § 1983 for violations of the Fourth, Eighth and Fourteenth Amendments, and (2) a claim under Cal. Civ. Code § 52.1, for violation of civil rights under California law.

The evidence shows that between February 14, 2006 and July 21, 2009,[1] thousands of prisoners[2] were transported for more than 24 continuous hours on at least one leg of their journeys. Plaintiffs assert that some of these prisoners were also picked up by a second vehicle, and transported for an additional period of more than 24 continuous hours. According to TransCor, prisoners in transit for more than 24 hours are transported on 19-, 23-, or 30-passenger transporters.[3] The 19- and 23-passenger transporters are staffed with four "transportation specialists," and the 30-passenger transporters are staffed with five specialists. Each crew is assigned to a 5-day transport,

---

[1] The class period is February 14, 2006 to the present.

[2] The parties dispute whether TransCor's records can be interpreted as showing how many prisoners were transported, as opposed to the number of "instances of transport." According to TransCor, one prisoner could have multiple "instances of transport." In any event, there is no dispute that TransCor transported thousands of prisoners during the class period.

[3] There are also some prisoners transported on vans. That issue is discussed *infra*.

which originates from and returns to the same hub location. During a 5 day trip, prisoners are picked up and dropped off at various correctional facilities. Prisoners will sometimes be dropped off at a hub before reaching their final destination, and TransCor states that its goal is to "deliver all inmates within 10 days of pickup," which includes both transit and housing time. Def s Ex. 8 at 114-15; Ex. 9 at 18-19.

TransCor's policy and practice is that restraints, including handcuffs, belly chains, leg irons, interconnects and black boxes, are applied to all prisoners, with the exception that pregnant women are not required to wear a belly chain or shackles. An "interconnect" is a chain approximately two feet long that is used to connect two prisoners together. Handcuffs are attached to the belly chain to prevent the prisoner from raising his or her arms. The black boxes are placed over the links connecting a prisoner's handcuffs, and they restrict wrist movement.

Each TransCor transport vehicle is divided into compartments, or cages. Prisoners are locked inside the cages. Most transport vehicles have a toilet on board, and prisoners are permitted to use the toilets only when the vehicle is stopped and they are let out of their cage and escorted to the toilet by a TransCor employee. TransCor asserts that stops are made for bathroom breaks every 3 to 4 hours, and that prisoners are also allowed to use the restroom any time the transporter stops for a pick up or a drop off. Prisoners remain in restraints and are chained to one another while using the toilet. Prisoners are advised against lying down in the transport vehicle, and if they sleep, they sleep sitting in their seats.

The parties dispute the extent to which prisoners are allowed to exercise. Plaintiffs assert that when

the vehicle is stopped, prisoners are sometimes allowed to stand up and stretch, to the extent that they can in their restraints and while chained to one another. TransCor asserts that prisoners are encouraged to stand up and stretch during stops, and that prisoners are permitted to walk up and down the transporter's aisle, two at a time, during restroom breaks once those inmates who need to use the restroom have done so.

Prisoners are provided with "fast food" meals during a transport. TransCor asserts that water is available to prisoners on all transporters at any time upon request.

TransCor asserts that prisoners are issued TransCor uniforms upon boarding a transporter, while plaintiffs assert that prisoners are not given a change of clothes.[4] It is undisputed that there is no running water on the transporters, and prisoners are not allowed to brush their teeth or shave. TransCor asserts that prisoners are provided hand sanitizers and hand wipes to use after using the bathroom and before eating.

LEGAL STANDARD

The decision as to whether to certify a class is committed to the discretion of the district court within the guidelines of Federal Rule of Civil Procedure 23. *See* Fed. R. Civ. P. 23; *see also Cummings v. Connell*, 316 F.3d 886, 895 (9th Cir. 2003). A court may certify a class if a plaintiff demonstrates that all of the prerequisites of Federal Rule of Civil Procedure

---

[4] TransCor asserts that prisoners who are staying overnight at a hub are permitted to shower, shave, and wash their clothes. However, these prisoners are not members of the proposed class or subclass.

23(a) have been met, and that at least one of the requirements of Federal Rule of Civil Procedure 23(b) have been met. *See* Fed. R. Civ. P. 23; *see also Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

Rule 23(a) provides four prerequisites that must be satisfied for class certification: (1) the class must be so numerous that joinder of all members is impracticable, (2) questions of law or fact exist that are common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. *See* Fed. R. Civ. P. 23(a).

A plaintiff must also establish that one or more of the grounds for maintaining the suit are met under Rule 23(b), including (1) that there is a risk of substantial prejudice from separate actions; (2) that declaratory or injunctive relief benefitting the class as a whole would be appropriate; or (3) that common questions of law or fact predominate and the class action is superior to other available methods of adjudication. *See* Fed. R. Civ. P. 23(b).

In determining the propriety of a class action, the question is not whether the plaintiffs have stated a cause of action or will prevail on the merits, but, rather, whether the requirements of Rule 23 are met. *See Staton v. Boeing Co.*, 327 F.3d 938, 954 (9th Cir. 2003); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). The Court is obliged to accept as true the substantive allegations made in the complaint. *See In re Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982); *see also Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975). Therefore the class order is speculative in one sense because the plaintiff

may not be able to later prove the allegations. *See Blackie*, 524 F.2d at 901 n. 17. However, although the Court may not require preliminary proof of the claim, it "need not blindly rely on conclusory allegations which parrot Rule 23 requirements. Courts may also consider the legal and factual issues presented by plaintiffs complaint." 2 Alba Conte & Herbert B. Newberg, Newberg on Class Actions, 7.26 (4th ed. 2005). Sufficient information must be provided to form a reasonably informed judgment on each of the requirements of Rule 23. *See Blackie*, 524 F.2d at 901 n. 17. In order to safeguard due process interests and the judicial process, the Court conducts an analysis that is as rigorous as necessary to determine whether class certification is appropriate. *See Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 961 (9th Cir. 2005); *see also Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982).

DISCUSSION

Plaintiffs seek to certify a class of "all pretrial detainees and prisoners who were transported by TransCor America LLC, its agents and/or employees, and forced to remain in the transport van for more than 24 hours, whose claims are timely under California law, including the tolling provisions of California Code of Civil Procedure sections 352 and 352.1." Second Amended Compl. ¶ 18. Plaintiffs also seek to certify a subclass of pretrial detainees and prisoners who were transported in California. *Id.* ¶ 19.

Defendants oppose class certification on numerous grounds. First, defendants contend that the proposed class is not objectively ascertainable, and they raise specific objections to the inclusion of particular types of inmates in the proposed class and subclass. Second, defendants contend that the named plaintiffs

are not typical or adequate. Third, defendants argue that while there are some common legal and factual issues, individual issues predominate such that class certification is not appropriate. Fourth, defendants argue that a class action is not a superior method of adjudication because of manageability problems and the interest of class members in pursuing individual actions. Finally, defendants contend that plaintiffs' claims under the California Tom Bane Civil Rights Act cannot be certified because that statute only provides for individual actions.

I. Challenges to scope and definition of class and subclass

A. "Objectively ascertainable" and tolling

Defendants contend that the proposed class and subclass are not objectively ascertainable "to the extent they are defined by prisoners falling within the tolling provision of [California Code of Civil Procedure] § 352." Section 352 tolls the time to file a claim if the claimant was "under the age of majority or insane" at the time the claim accrued. Cal. Code Civ. Proc. § 352. Defendants argue that while a class member's age is objectively ascertainable, the Court would nevertheless be required to conduct individualized determinations about an inmate's length of minority status and release date. Defendants argue that making determinations about a class member's insanity is even more complicated because it would require an inquiry into each person's medical history and evidence that he or she was "incapable of caring for his or her property or transacting business or understanding the nature or effects of his or her acts" at the time of the transport. *Alcott Rehab. Hosp. v. Superior Court*, 93 Cal. App. 4th 94, 101 (2001). Defendants argue that simply because a prisoner was

picked up or dropped off at a hospital for the mentally ill does not mean that the prisoner was "insane" under Section 352, because a finding of insanity requires an inquiry into each person's medical history, and evidence that he was "incapable of caring for his or her property or transacting business or understanding the nature of his or her acts" at the time of transport. *Alcott Rehab. Hosp. v. Superior Court*, 93 Cal. App. 4th 94, 101 (2001). Plaintiffs respond that this standard—"incapable of caring for his or her property or transacting business or understanding the nature of his or her act"—is an objective one, and that "while lay opinion may or may not be sufficient to establish the requisite mental disability, the expert reports used to justify the potential plaintiffs' confinement should be available, and can be obtained during the claims process." Plaintiffs' Reply at 3:7-9.

The Court agrees with defendants that including inmates who were transported prior to the class period but whose claims have been tolled raises significant ascertainability problems. To determine whether a putative class member's claim is timely, the Court would need to evaluate each person's length of insanity or minority status, as well as prison release date. With regard to those persons whose claims are tolled on account of insanity, the tolling analysis would involve the further individualized inquiry about the degree and nature of the person's mental illness. The Court finds it appropriate to define the class to include only those pretrial detainees and prisoners who were transported between February 14, 2006 and the present because this class period will encompass all timely claims and is precise, objective and ascertainable.

B. Federal prisoners

Next, defendants contend that the proposed class and subclass cannot include federal inmates because § 1983 only authorizes claims against state actors, and not against entities acting under color of federal law. *See Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1987) ("There is no valid basis for a claim under section 1983, in that Daly-Murphy's allegations are against federal officials acting under color of federal law."). However, as plaintiffs correctly note, the issue is not whether a potential class member was a federal or state inmate, but rather whether TransCor was acting on behalf of a state or federal agency when transporting inmates. Plaintiffs provide the example of plaintiff William Tellez, who was transported from the Federal Penitentiary in Atwater, California, to the Las Vegas Metro Police Department pursuant to a writ issued on behalf of the Las Vegas Metro Police Department. TransCor's Order Detail for that transport states that the "customer" was the Las Vegas Metro Police Department. Snell Decl. Ex. S at 1. The Court agrees with plaintiffs that because the "customer" is identified on each prisoner's Order Detail, the determination of whether TransCor was acting on behalf or a state or federal agency can easily be made during the claims process.

C. Administrative remedies

Defendants also argue that the proposed class and subclass cannot include prisoners who failed to exhaust administrative remedies, as required by the Prison Litigation Reform Act. The PLRA requires that prior to bringing an "action with respect to prison conditions under section 1983," a prisoner confined in any jail or prison must exhaust "such administrative remedies as are available." 42 U.S.C. § 1997e(a). However,

administrative exhaustion is not required "when no pertinent relief can be obtained through the internal process." *Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005); *see also Kaemmerling v. Lappin*, 553 F.3d 669, 675 (D.C. Cir. 2008) (the Act's exhaustion requirement does not apply in a case "in which there is no administrative process to exhaust."). Because the failure to exhaust is an affirmative defense, defendants have the burden of raising and proving that an administrative remedy is available. *Id.* at 936.

Plaintiffs contend that the evidence relied on by defendants fails to prove that an administrative remedy was available to plaintiffs. The Court agrees. Defendants have submitted excerpts from the depositions of Sondra Pedigo, who was designated by TransCor as the person most knowledgeable about prisoner complaints, and Charles Westbrook, TransCor's Director of Operations. Ms. Pedrigo testified that there is "not a standard form for a prisoner to make a complaint," and that "Normally, if there is a prisoner complaint, they'll wait until they get to their facility they're being dropped off at, and that's where they'll make their complaint. And then once they make that complaint, then that's when we get a phone call in our corporate office from that facility." Snell Supp. Decl. Ex. HH (Pedigo depo. at 171:14-24). Ms. Pedigo did not know whether records were kept of those complaints. *Id.* at 171:25-172:7. Mr. Westbrook testified that he has never seen any complaints, and that "if [prisoners] have any complaints, what they're told is, once you get to your facility—once you get to your destination, you can file a grievance at that point." Def's Ex. 11 (Westbrook depo. at 42:12-14). When asked, "Do you know what happens to prisoner grievances that may be filed at the institutions to which they are transported?,"

Mr. Westbrook answered, "Again, sir, that's not my field." *Id.* at 42:15-19. Defendants have also submitted the deposition testimony of Fred Wisdom, who trains TransCor employees, and who testified that he trains employees to record prisoner complaints on incident reports, which are then sent to headquarters. Def's Ex. 6 (Wisdom depo. at 24:1-25:1). This evidence falls far short of showing that there was an internal TransCor grievance process available to inmates who had complaints about their transports. To the extent defendants assert that prisoners should exhaust their administrative remedies by filing complaints at the institutions to which they are dropped off or picked up, TransCor has made no showing that the institutions would be able to address or remedy the alleged deficiencies in TransCor's policies and procedures. *Cf. Malik v. District of Columbia*, 574 F.3d 781, 785 (D.C. Cir. 2009) (examining correctional facility's grievance policy and finding that institutional transfers were not grievable matters).

Defendants also rely on *Malik v. District of Columbia*, 512 F. Supp. 2d 28 (D.D.C. 2007), *rev'd on other grounds*, 574 F.3d 781. In *Malik*, a pro se prisoner[5] sued the District of Columbia, a correctional services company retained by the District, and TransCor, claiming Eighth Amendment violations during a 40-hour bus ride transferring the inmate between two facilities. The court found that the inmate failed to exhaust administrative remedies as to the District and the correctional services company, and denied TransCor's motion for summary judgment on the

[5] The 2007 district court decision states that the plaintiff was *pro se*. At the February 12, 2010 hearing, defense counsel, who is also defense counsel in *Malik*, stated that the *Malik* plaintiff is currently represented by counsel.

ground that there was a genuine issue of material fact as to whether the plaintiff had exhausted remedies under the company's informal grievance policy. *Id.* at 32. In *Malik* the plaintiff claimed that he had filed a complaint, and it did not appear that the then *pro se* plaintiff challenged the adequacy of the grievance process itself Moreover, in *Malik* TransCor submitted evidence of an informal policy whereby inmates were directed to send complaints to particular departments or people, and TransCor employees were assigned to investigate complaints. *Id.* at 32. There has been no such factual showing here. Finally, even if TransCor had administrative remedies available to inmates, plaintiff Schilling was not required to exhaust those remedies under the PLRA because he was not an inmate at the time he filed this lawsuit. *See Talamantes v. Levya*, 575 F.3d 1021, 1024 (9th Cir. 2009).

D. Physical injury

Defendants also argue that the class and subclass cannot include prisoners who suffered no physical injury. The PLRA provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). The Ninth Circuit has held that the injury "need not be significant but must be more than *de minimis*," and that "[t]his interpretation reflects Congress's intent in passing the PLRA . . . to curtail frivolous prisoner litigation . . . [and] to reduce the burgeoning volume of prisoner litigation in the federal courts." *Oliver v. Keller*, 289 F.3d 623, 627-28 (9th Cir. 2002).

Plaintiffs contend that the "physical injury" requirement of the PLRA is met because the named

plaintiffs allege that they suffered physical injuries as a result of their treatment by TransCor, and it is not necessary for every member of the class to demonstrate "physical injury." *See Kelsey v. County of Schoharie*, No. 1:04-CV-299, 2007 WL 603406, at *11 (N.D.N.Y. Feb. 21, 2007) ("The language of § 1997e(e) requires a showing of physical injury only in suits brought, i.e. commenced or filed, by prisoners, not those in which they join as members of a class action."), *rev'd on other grounds*, 567 F.3d 54 (2d Cir. 2009). Defendants have not cited any authority holding that the physical injury requirement applies to class members. In the absence of any such authority, the Court finds that the physical injury requirement is satisfied because the named plaintiffs allege physical injury. This interpretation is consistent with the intent of the PLRA, because it ensures that the lawsuit is not frivolous, and requiring every class member to meet the physical injury requirement would not reduce prisoner litigation. Moreover, claims for declaratory and injunctive relief are unaffected by § 1997e(e); therefore, the statute "does not nullify the Eighth Amendment by leaving violations of it without a remedy." *Zehner v. Trigg*, 133 F.3d 459, 464 (7th Cir. 1997); *accord Harper v. Showers*, 174 F.3d 716, 719 (5th Cir. 1999); *Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998).

E. "24 hour" aspect of class definition

Defendants contend that the class and subclass definition is vague because it does not specify whether it includes only those individuals who were on a transporter for more than 24 continuous hours, or whether it also includes individuals whose total transport was more than 24 hours, but who were taken off a transporter to switch vehicles or to be

housed a hub for some period of time during the transport.

Plaintiffs respond that there is nothing vague about the definition because the total amount of time of each prisoner's journey is objectively measurable, and defendants' computerized data makes it possible to calculate the precise length of each prisoner's transport, including each segment of a transport. Plaintiffs clarify that they are seeking certification of a class of prisoners who were transported continuously for more than 24 hours and who were not allowed to sleep overnight in a bed, even if those prisoners switched vehicles at some point during their journey. To the extent there is any ambiguity in the proposed definition, this order clarifies that the class and subclass include those individuals.

F. Van transports

Defendants contend that individuals who were transported in vans (as opposed to the 19-, 23-, or 30-passenger "transporters") should not be included in the class and subclass for a number of reasons. First, defendants contend that plaintiffs never requested data on van transports during class discovery. However, plaintiffs state that they requested documents reflecting, *inter alia*, the types of vehicles in which prisoners were transported.

Second, defendants assert that as a factual matter, prisoners transported in vans do not meet the class definition because van transports are limited to 15 hours, and if a prisoner has not reached his destination within 15 hours, he is housed overnight and picked up the next day. However, defendants acknowledge that "occasionally are they transferred to another van," Opposition at 14:22-23, and thus there

could be individuals who were transported for more than 24 hours by van. Defendants also object that TransCor's system does not contain information about whether a van transport included a "Rest Over Night," and therefore TransCor cannot provide a list of van order segments that reflects only those prisoners who were in transit for more than 24 hours. Plaintiffs assert, however, that TransCor has other records, such as Order Detail Reports, Trip Reports, Activity Logs, and Trip Manifests, from which it can be determined whether prisoners transported by van were housed in a facility long enough to sleep in a bed. Based on defendants' admission that, at least on occasion, prisoners transported in vans have been transported for more than 24 hours, and the existence of records by which these prisoners can be identified, the Court finds it appropriate to include these prisoners in the class and subclass.

II. Rule 23(a) requirements: numerosity, commonality, typicality and adequacy

A. Numerosity

Based upon TransCor's records, the estimated total number of members of the proposed class is approximately 16,000, and the total number of members of the proposed subclass of prisoners transported in California is approximately 4,800. Defendants do not contest numerosity, and the Court finds that his requirement is met.

B. Commonality

Defendants concede that there are some common issues of law and fact, and instead contend that plaintiffs cannot demonstrate the Rule 23(b)(3) requirement that common issues predominate over individualized questions. The Court addresses this issue *infra*.

C. Typicality and adequacy

Rule 23(a) requires that plaintiffs show that the named plaintiffs' claims are typical of those of the class, and that the named plaintiffs will adequately represent the class. "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Id.*

Defendants contend that the named plaintiffs are not typical or adequate for a variety of reasons, discussed below. Defendants do not challenge the qualifications of plaintiffs' counsel, and the Court finds that the plaintiffs' counsel is qualified and able to litigate this case.

1. John Pinedo

Defendants assert that plaintiff Pinedo is not typical because his transport was only 23 hours and 28 minutes, and thus he cannot represent a class of prisoners who were transported for more than 24 hours. In so arguing, defendants assert that the TransCor "PECS"[6] report for Pinedo's transport, which shows that he was in transit for 24 hours and 23 minutes, is inaccurate and overstates the time of

---

[6] "PECS" stands for TransCor's proprietary Prisoner Extraction and Control System, which is used to track transport orders and plan trips. Def's Ex. 1 (Crouch Decl. ¶ 6).

the transport. Defendants have submitted the declaration of James Crouch, TransCor's Director of Planning, which states that the time of pick up contained on a report is the time that the vehicle arrived at the facility, not the time that the prisoner is actually restrained and put in TransCor's care. Def's Ex 1 (Crouch Decl. ¶¶ 46). Defendants assert that the accurate pick up and drop off times can be determined from the "Activity Logs" kept for each transport.

Plaintiffs respond that defendants are asking the Court to ignore TransCor's business records, which purport to show the "actual time" of inmate pick up and drop off, and to rely instead on Mr. Crouch's "understanding" and "expectation." Plaintiffs also note that notwithstanding defendants' assertions about the inaccuracy of the times reported in the PECS system, defendants use those same PECS records when calculating the length of transports. *See id.* ¶¶ 31-36. The Court finds that Mr. Crouch's testimony does not outweigh TransCor's business records, which TransCor itself relies upon, and thus that Mr. Pinedo may represent the class.

Defendants also contend that Mr. Pinedo is not an adequate representative because he had not read the complaint prior to the time it was filed. However, this fact does not render Mr. Pinedo inadequate to represent the class, and as plaintiffs note, Mr. Pinedo had read the complaint by the time he was deposed, and plaintiffs assert that Mr. Pinedo has taken an active role in the case. Defendants do not contend that Mr. Pinedo has any conflicts of interest with the class, and the Court finds that he is an adequate named plaintiff.

2. Plaintiff William Tellez

Defendants argue that Mr. Tellez is not typical or adequate because he was and is a federal inmate. As explained *supra*, however, TransCor transported Mr. Tellez to and from the Las Vegas Metro Police Department, and TransCor's Order Detail states that its "customer" was the Las Vegas Metro Police Department. Snell Decl. Ex. S at 1. Thus, absent evidence to the contrary, TransCor was acting on behalf of a state agency when it transported Mr. Tellez, and thus he can maintain a § 1983 claim against TransCor.

Defendants also challenge Mr. Tellez on the ground that he became involved in this case after reading about it in Prison Legal News. This fact alone does not render Mr. Tellez an inadequate plaintiff, and defendants do not assert that Mr. Tellez has any conflicts with the proposed class. The Court finds that he is an adequate named plaintiff.

3. Plaintiff Kevin Schilling

Defendants challenge plaintiff Schilling's typicality on the ground that he alleges he was assaulted by defendants Smith and Brummett during his transport. Defendants argue that Schilling's individual assault claims are unique to him and thus somehow render him atypical. However, Rule 23 permits actions that include both class and individual claims, and such cases are common. *See* Fed. R. Civ. Proc. 23(c)(4); *Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 780 (9th Cir. 1986). Defendants have not identified any particular problems with the concurrent litigation of the class claims and Schilling's individual claims, and the Court finds that Schilling's individual claims do not bar him from acting as a named plaintiff.

III. Rule 23(b)(3) requirements

A. Common vs. individual issues

Defendants contend that plaintiffs cannot show that "questions of law or fact common to class members predominate over any questions affecting only individual members," as required by Rule 23(b)(3). Defendants contend that although there are common issues as to the nature of TransCor's policies and procedures, whether those policies and procedures violated a prisoner's constitutional rights will involve individualized, fact-specific determinations. For example, defendants argue that a prisoner's Fourth Amendment excessive force claim challenging the use of restraints will depend on the facts and circumstances of his transport, including whether he was convicted of or charged with a violent crime, and whether he had a history of escape attempts. Defendants argue that the Eighth Amendment claims involve even more individualized inquiries about whether each class member was adequately provided food, fluids, exercise, hygiene, and medical care. Defendants note that the three named plaintiffs had different experiences with regard to how many meals and bathroom breaks they were provided during their transports.

Plaintiffs respond that minor variations in inmates' experiences during their transports should not defeat certification because the predominant issue in this case is whether defendants' policy of denying prisoners "rest over night" while the prisoners remain in restraints in a vehicle violates the inmates' constitutional rights. Plaintiffs rely on cases in which similar claims were certified, such as *Thomas v. Baca*, 231 F.R.D. 397 (C.D. Cal. 2005), in which the court certified a class of county jail detainees who alleged that their constitutional rights were violated when

the sheriffs department required them to sleep on the floor. *See id.* at 402 ("The central issue to a claim brought by any potential class member is whether the fact that LASD allegedly required him to sleep on the jail floor permits him to recover under § 1983.").

In *Tyler v. Suffolk County*, 253 F.R.D. 8 (D. Mass. 2008), the court certified a class of inmates at a state prison who alleged that the conditions of their confinement violated the Eighth Amendment because they were denied free access to toilet facilities. The inmates were housed in "dry" cells that were not equipped with toilets, and when the inmates were locked in their cells from 11:00 pm to 7:00 am, they could only use the toilets if permitted by the guards on duty. *Id.* at 9. The plaintiffs alleged that, due to either the guards' inattention or malice, "their bathroom access was unreliable and they were, at times, forced to urinate and defecate into bags or bottles which could not be emptied until the following morning." *Id.* The defendants argued, as TransCor does here, that individual issues predominated because the court would be required to conduct an individualized inquiry about whether each inmate was actually denied access to the toilet facilities. The court rejected that argument, holding "[t]he government's objections extend beyond the bounds of class certification and address, instead, the merits of the plaintiffs' claims. The plaintiffs' position is that the system of bathroom access under which Building 4 operated is per se a violation of their Eighth Amendment rights. The questions raised by the defendants of whether the system itself was unlawful and how it was modified over time present issues of law and fact, respectively, which are common to all class members." *Id.* at 10. The court also held that the objections raised by the government "relates to the divergent

damages among class members rather than to differences in liability." *Id.* at 11.

Similarly, in *Dunn v. City of Chicago*, 231 F.R.D. 367 (N.D. Ill. 2005), the court held that the commonality requirement was satisfied by a class of detainees who were held in interrogation rooms for more than 16 hours and who alleged they were subjected to inhuman conditions. The plaintiffs alleged that they were at the "whim" of officers and detectives for food, water, and access to bathroom facilities, and that they became sleep-deprived because the metal benches in the interrogation rooms were not long enough for an adult to lie down on. *Id.* at 370-71. The plaintiffs challenged "(1) the maintenance of an unconstitutional, written policy requiring shackling of detainees held in interrogation rooms; (2) the failure to enact policies limiting the amount of time a detainee may be held in an interrogation room; (3) the failure to establish policies for food services and other humane treatment for persons held in the rooms; (4) the failure to provide proper sleeping facilities for persons held in the rooms, including bedding; and (5) the deliberately indifferent failure to correct a repeated pattern of neglect of the human needs of persons held in interrogation rooms." *Id.* at 372. The defendants opposed certification by arguing that detainees were not subjected to standardized conduct or conditions, and they submitted evidence showing, *inter alia*, that some detainees had been provided food, water, and access to bathrooms. *Id.* The court held that these factual differences did not defeat commonality: "The fact that certain detainees were treated marginally better on an ad hoc basis than others does not alter plaintiffs' allegations that they were subject to the standard practice of prolonged detention in interrogation rooms rather

than the lock-up without a legitimate police purpose, and that the interrogation rooms are inherently unfit for human occupancy for more than a few hours." *Id.*[7]

Plaintiffs' claims are similar to those advanced in *Tyler, Baca*, and *Dunn*, and the Court agrees with the reasoning of those courts that any factual differences in how class members were treated do not defeat certification. Plaintiffs challenge the conditions to which they were subjected during 24 hour transports, and it is undisputed that all inmates are restrained during such transports and not provided with a "rest over night." As in *Baca* and *Dunn*, plaintiffs challenge the failure to enact policies to ensure adequate access to food, water, and bathroom facilities, and they allege that as a result of such failures, they have been subject to the whim of TransCor employees responsible for each transport. In order to establish liability, plaintiffs must objectively show that they were deprived of something "sufficiently serious." *Foster v. Runnels*, 554 F.3d 807, 812 (9th Cir. 2009). Whether inmates who have been transported for more than 24 hours and who are not allowed to sleep overnight have been deprived of something "sufficiently serious" can be determined on a classwide basis. While there is also a subjective component to the analysis in that inmates must also show that a deprivation occurred with deliberate indifference the inmates' needs, *id.*, that inquiry does not mean that the legality of policies and practices applied to all inmates cannot be litigated on a class basis.

---

[7] The Dunn court did not certify the class because the named plaintiff 's claims were time-barred. *Id.* at 374. The court stated that it would consider allowing a new named plaintiff to represent the class.

Defendants' reliance on *Pierce v. County of Orange*, 519 F.3d 985, 993-94 (9th Cir. 2008), *amended and superseded on denial of reh'g*, 536 F.3d 1190 (9th Cir. 2008), is unavailing. In Pierce, the Ninth Circuit held that the district court did not abuse its discretion when it decertified a damages class estimated as large as 180,000 pretrial detainees because, *inter alia*, class membership was "highly fluid and indefinite" and it was undisputed that County records were incomplete and unreliable. *Id.* However, *Pierce* did not hold that classes challenging prison conditions could not be certified, and in fact *Pierce* involved class-wide liability determinations on claims challenging prison conditions. *See generally id.*

B. Superior method of adjudication

Rule 23(b)(3) also requires that a class action be superior to other methods of adjudication. Defendants contend that the superiority requirement is not met because there are at least two other pending lawsuits against TransCor that raise similar claims. However, as plaintiffs note in their reply, both of these cases (*Bagent v. Pierce*, CV06-1842 (E.D. Cal.)) and *Myers v. TransCor America LLC*, CV 08-00656 (M.D. Tenn.)) involve *pro se* litigants who are proceeding *in forma pauperis*. TransCor also cites a number of cases that have been dismissed against TransCor; those cases were also largely litigated by *pro se* plaintiffs. Rather than suggesting that a class action is not a superior method of adjudicating these claims, these cases indicate that a class action with the class represented by qualified counsel, is superior to numerous individual *pro se* cases.[8]

---

[8] Defendants raise a number of other arguments about why a class action is not superior. These arguments are largely duplic-

IV. Tom Bane Civil Rights Act

Defendants contend that plaintiffs' claims under the Tom Bane Civil Rights Act cannot be certified. The Bane Act provides that "[a]ny individual whose exercise or enjoyment of rights secured by the Constitution . . . has been interfered with or attempted to be interfered with [through threats, intimidation or coercion] may institute or prosecute in his or her own name and on his or her own behalf a civil action for damages." Cal. Civil Code § 52.1(b). Defendants argue that under the plain language of the Bane Act, an individual can only bring a claim "in his or her own name and on his or her own behalf," and that the Bane Act does not authorize a representative action.

There is a split of authority regarding whether a class action can be brought under the Bane Act. Defendants rely on *Taggart v. Solano County*, CIV-S-05-0783 DFL, 2005 WL 3325752 (E.D. Cal. Dec. 6, 2005), in which the court held that the structure and language of the statute does not authorize individuals to bring representative actions. The *Taggart* court noted that Section 52.1(a) authorizes the Attorney General, district attorneys, and city attorneys to bring claims "in the name of the people of the State of California against a person who interferes with the exercise or enjoyment of the rights of an individual or individuals," while Section 52.1(b) specifies that an individual may bring a civil action "on his or her own behalf." *Id.* at *4. In contrast, plaintiffs rely on *Craft v. County of San Bernadino*, No. EDCV 05-359-SGL, 2006 WL 4941829 (C.D. Cal. Mar. 23, 2006), which

---

ative of arguments addressed *supra*—such as defendants' arguments about the ascertainability of the class and the predominance of individual issues—and thus will not be repeated here.

reached the opposite conclusion and found *Taggart* "less than persuasive." *Id.* at *3. The Craft court found that the term "on his or her own behalf' in subsection (b) "may more simply be read as a means to distinguish itself from subsection (a), which authorized suits by the state Attorney General for statutory violations," rather than a limitation on class actions. *Id.* The court found significant "the fact that subsection (g) makes clear that any of the remedies available under section 52.1 are in addition to 'any other action, remedy, or procedure that may be available to an aggrieved individual under any other provision of law.' Such 'other remedy' includes that provided by California Code of Civil Procedure section 382, the class action statute." *Id.* (quoting Cal. Civ. Code § 52(g)). The Court agrees with the analysis of the *Craft* court, and finds that the Bane Act permits class claims because there is no language expressly prohibiting class actions, and because of the broad language of § 52(g) providing that the Bane Act remedies are in addition to other available remedies.

Defendants also contend that the Bane Act claim cannot be certified because the Bane Act requires an individualized analysis as to whether each inmate was threatened, intimidated or coerced. *See* Cal. Civ. Code § 52.1(b). However, plaintiffs have alleged that all inmates were handcuffed and shackled. These allegations are sufficient to meet the "coercion" element of a Bane Act claim. *See Martin v. County of San Diego*, 650 F. Supp. 2d 1094, 1108-09 (S.D. Cal. 2009).

CONCLUSION

For the foregoing reasons, the Court GRANTS plaintiffs' motion for class certification. (Docket No. 90). The Court certifies the following class and subclass:

1. A class of all pretrial detainees and prisoners who were transported by TransCor America LLC, its agents and/or employees between February 14, 2006 and the present, and who were forced to remain in restraints in the transport vehicle for more than 24 hours without being allowed to sleep overnight in a bed. The class includes pretrial detainees and prisoners who were removed from one transport vehicle and placed directly onto another, without being housed overnight, whose combined trip lasted more than 24 hours. The class only includes those pretrial detainees and prisoners who were transported by TransCor on behalf of a state agency, and does not include pretrial detainees and prisoners who were transported on behalf of a federal agency.

2. A subclass of all pretrial detainees and prisoners who were transported by TransCor America LLC, its agents and/or employees in the State of California between February 14, 2006 and the present, and who were forced to remain in restraints in the transport vehicle for more than 24 hours without being allowed to sleep overnight in a bed. The class includes pretrial detainees and prisoners who were removed from one transport vehicle and placed directly onto another, without being housed overnight, whose combined trip lasted more than 24 hours. The class only includes those pretrial detainees and prisoners who were transported by TransCor on behalf of a state agency, and does not include pretrial detainees and prisoners who were transported on behalf of a federal agency.

The Court also appoints attorneys Andrew C. Schwartz, Karen L. Snell, and Mark E. Merin as class counsel.

Counsel for plaintiffs and defendants shall meet and confer and, no later than March 12, 2010, submit a joint form of proposed Notice and plan for class notification.

IT IS S10 ORDERED.

Dated: February 16, 2010

/s/ SUSAN ILLSTON
SUSAN ILLSTON
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: 04/14/2010]

No. 10-80055

D.C. No. 3:08-cv-00941-SI
Northern District of California,
San Francisco

ORDER

Before: FISHER and M. SMITH, *Circuit Judges*.

The court, in its discretion, denies the petition for permission to appeal the district court's February 16, 2010 order granting class action certification. *See* Fed. R. Civ. P. 23(f); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005) (per curiam).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: 07/08/2010]

No. 10-80055

D.C. No. 3:08-cv-00941-SI
Northern District of California,
San Francisco

KEVIN M. SCHILLING; *et al.*,
Plaintiffs - Respondents,

v.

TRANSCOR AMERICA, LLC; *et al.*,
Defendants - Petitioners.

ORDER

Before: FISHER and M. SMITH, *Circuit Judges*.

Petitioners' petition for rehearing en banc, received on May 4, 2010, is deemed filed and is construed as a motion to reconsider en banc the court's April 14, 2010 order. So construed, the motion is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings shall be accepted in this closed case.

APPENDIX D

42 U.S.C. § 1997e

§ 1997e. Suits by prisoners

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

(b) Failure of State to adopt or adhere to administrative grievance procedure

The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title.

(c) Dismissal

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

(d) Attorney's fees

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988[1] of this title, such fees shall not be awarded, except to the extent that—

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiffs rights protected by a statute pursuant to which a fee may be awarded under section 1988[1] of this title; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly

---

[1] See Reference in Text note below.

[1] See Reference in Text note below.

rate established under section 3006A of Title 18 for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988[1] of this title.

(e) Limitation on recovery

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(f) Hearings

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other

---

[1] See Reference in Text note below.

communications technology in any hearing held at the facility.

(g) Waiver of reply

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1983 of this title or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) "Prisoner" defined

As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

APPENDIX E

Federal Rule of Civil Procedure 23

Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not

parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) *Certification Order.*

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative,

the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice.*

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(0(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues.* When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) *In General.* In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appoint-

ment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Filed: 10/19/09]

Case No. 3:08-cv-00941-SI

KEVIN M. SCHILLING, JOHN PINEDO, WILLIAM TELLEZ, on behalf of themselves and all those similarly situated,
Plaintiffs,

vs.

TRANSCOR AMERICA, LLC, SGT. JOHN SMITH, OFFICER JEFF BRUMMETT, and DOES 1 through 100,
Defendants.

SECOND AMENDED CLASS ACTION COMPLAINT
DEMAND FOR JURY TRIAL

PLAINTIFFS COME BEFORE THIS HONORABLE COURT AND ALLEGE:

INTRODUCTION

1. This is an action for declaratory and injunctive relief, damages, and punitive damages against TRANSCOR AMERICA, LLC, SGT. JOHN SMITH, OFFICER JEFF BRUMMETT and DOES 1 THROUGH 100 (persons sued herein by their fictitious names) for violations of plaintiffs' constitutional rights and those of other similarly situated persons.

2. In this complaint, plaintiffs allege that TRANSCOR AMERICA, LLC's official policy, practice, or custom of transporting pretrial detainees and prisoners

in conditions that amount to cruel and unusual punishment violated and violates the rights of plaintiffs, and each of those persons similarly situated, secured by the Fourth, Eighth and Fourteenth Amendments to the U.S. Constitution and entitles plaintiffs, and each of those similarly situated, to recover damages and attorneys' fees under the Federal Civil Rights Act (42 U.S.C. §§ 1983, 1988). TRANSCOR AMERICA, LLC's policies, practices or customs include but are not limited to transporting pretrial detainees and prisoners in small metal cages in which a person can neither stand up nor lie down for more than 24 hours at a time while the person is handcuffed, chained, and in shackles, and failing to provide pretrial detainees and prisoners with adequate food, fluids, exercise, hygiene, and medical care.

3. Because TRANSCOR AMERICA, LLC's official policy, practice, or custom is to transport pretrial detainees and prisoners in conditions that amount to unlawful detention, excessive force, and cruel and unusual punishment, there is a likelihood of future injuries to pretrial detainees and prisoners including members of the plaintiff class. Accordingly, plaintiffs seek an order declaring unlawful TRANSCOR AMERICA, LLC's policy, practice or custom of transporting pretrial detainees under the conditions described above and enjoining TRANSCOR AMERICA, LLC from engaging in this conduct in the future.

4. Plaintiffs include claims for damages and attorneys' fees under California state law against TRANSCOR AMERICA, LLC for violation of the Bane Civil Rights Act (California Civil Code § 52.1(b)) pursuant to which plaintiffs are, and each of those persons similarly situated in the subclass of pretrial detainees and prisoners transported by defendants in

California is, entitled to recover a minimum of $4,000 for each violation of rights secured to them by the constitution or laws of the state of California and the constitution or laws of the United States and attorneys' fees (California Civil Code § 52.1(h)).

5. Plaintiffs include claims for damages and attorneys' fees under the Federal Civil Rights Act (42 U.S.C. §§ 1983, 1988) against all defendants for their violation of plaintiffs' Fourth and Fourteenth Amendment right to be free from the use of excessive force, and the right to be provided with adequate medical care.

6. Finally, plaintiffs include a claim for damages and attorneys' fees under the Federal Civil Rights Act (42 U.S.C. §§ 1983, 1988) against TRANSCOR AMERICA, LLC and DOES 1-10 for its failure to adequately supervise SGT. SMITH, OFFICER JEFF BRUMMETT, and DOES 11 through 100.

JURISDICTION

7. This action is brought pursuant to 42 U.S.C. §§ 1983 and 1988, and the Fourth, Eighth and Fourteenth Amendments to the United States Constitution. Jurisdiction is founded upon 28 U.S.C. §§ 1331 and 1341(3) and (4) and the aforementioned statutory and constitutional provisions.

8. The court has supplemental jurisdiction over plaintiffs' state claims under 28 U.S.C. § 1367(a).

9. The amount in controversy exceeds $10,000, excluding interest and costs.

PARTIES

10. Plaintiff KEVIN M. SCHILLING is a resident of Pleasant Hill, California. Like all those similarly situated, plaintiff is and at all material times herein

was a citizen of the United States who was arrested in one jurisdiction for an offense allegedly committed in another jurisdiction and was transported from one detention facility to another detention facility by defendants.

11. Plaintiff JOHN PINEDO is a resident of Delano, California. Like all those similarly situated, plaintiff is and at all material times herein was a citizen of the United States who was a sentenced prisoner serving time in one jurisdiction when he was picked up by defendant TRANSCOR AMERICA, LLC and transported to another jurisdiction for a court appearance.

12. Plaintiff WILLIAM TELLEZ is a citizen of the United States who was serving the sentence of a criminal court for a term less than for life in the Federal Penitentiary in Atwater, California, when he was picked up and transported to and from Clark County Detention Center in Nevada by defendant TRANSCOR AMERICA, LLC. Plaintiff TELLEZ remained in prison from the time he was returned to the Federal Penitentiary in Atwater, California to the date of the filing of this complaint.

13. Defendant TRANSCOR AMERICA, LLC is and at all material times referred to herein was a for-profit Tennessee corporation licensed to do business in California whose business entails the transportation of pretrial detainees and prisoners throughout the United States on behalf of federal, state, and local governments.

14. Defendant SGT. JOHN SMITH is an agent and/or employee of defendant TRANSCOR AMERICA, LLC.

15. Defendant OFFICER JEFF BRUMMETT is an agent and/or employee of Defendant TRANSCOR AMERICA, LLC.

16. Plaintiffs are informed and believe and thereon allege that defendants sued herein by their fictitious names, DOES 1 through 100, are agents and/or employees of defendant TRANSCOR AMERICA, LLC. Plaintiffs are not currently aware of the true names and identities of those sued herein as DOES 1 through 100, but will amend their complaint to include such persons' real names once said names are made available to them.

17. At all material times mentioned herein, each of the defendants was acting under the color of law, to wit, under color of statutes, ordinances, regulations, policies, customs and usages of the United States and its States, including but not limited to the State of California.

18. Class action plaintiffs are all those similarly situated pretrial detainees and prisoners who were transported by TRANSCOR AMERICA, LLC, its agents and/or employees, and forced to remain in the transport van for more than 24 hours, whose claims are timely under California law, including the tolling provisions of California Code of Civil Procedure sections 352 and 352.1.

19. For purposes of the California Bane Act Claim, class action plaintiffs are all those similarly situated pretrial detainees and prisoners who were transported in the State of California by TRANSCOR AMERICA, LLC, its agents and/or employees, and forced to remain in the transport van for more than 24 hours, whose claims are timely under California law, including the tolling provisions of California Code of Civil Procedure sections 352 and 352.1.

FACTS

20. In or about early September, 2006, plaintiff KEVIN M. SCHILLING was arrested at his home in Vallejo, California on a no-bail warrant issued by a court in Las Vegas, Nevada. Plaintiff was booked into a detention facility in Fairfield, California, where he remained for several days.

21. On or about September 25, 2006, plaintiff was picked up at the Fairfield Detention facility by agents and/or employees of defendant TRANSCOR AMERICA, LLC. Before boarding the transport van, plaintiff was strip searched. He was then handcuffed, a restraint was applied that secured his hands to his waist, and he was shackled. After boarding the transport van, plaintiff was seated in a small, locked metal cage.

22. For the next several days, plaintiff remained in the transport van, restrained as described above, while the van meandered around California—from Fairfield through counties within the Northern District of the United States District Court, to Fresno and then back, once again, through counties within the Northern District of the United States District Court, to Fairfield—picking up and dropping off pretrial detainees and/or prisoners.

23. During his time in the transport van, plaintiff was provided with only two meals a day which consisted of a fast food sandwich or hamburger and a cup of water. Plaintiff was not permitted to lie down or stand up or shower or shave or brush his teeth or change his clothes. He was forced to use the on-board toilet at the defendants' convenience. Eventually, it backed up and smelled bad. But for the steps from his cage to the toilet and back, he was allowed no physical activity.

24. When, after approximately four days of traveling in these conditions, plaintiff realized that the TRANSCOR AMERICA, LLC transport van was headed back to Fairfield, he demanded to talk to the warden. In response, and while he was still detained as described above, defendants SGT. JOHN SMITH and OFFICER JEFF BRUMMETT grabbed him and sprayed pepper spray in his face. While plaintiff was still unable to see, SGT. JOHN SMITH purposely walked him into poles and, along with an unknown TRANSCOR AMERICA, LLC employee, proceeded to punch him. Although this occurred at approximately 3:00 a.m. outside the Fresno County Jail, plaintiff was not allowed to shower or change clothes or see a nurse or a doctor until approximately two days later when, after making numerous stops along the way, the transport van reached Imperial County Jail.

25. Plaintiff remained in the Imperial County Jail for approximately three days, after which time he was transported to Las Vegas.

26. On or about June 29, 2006, at approximately 9:00 a.m., plaintiff JOHN PINEDO was picked up by defendant TRANSCOR AMERICA, LLC, at Kern Valley State Prison in Delano, California where he was serving a sentence for possession and sale of marijuana, and transported to Santa Barbara County Jail where he arrived on June 30, 2006, more than 27 hours later for a child custody hearing.

27. The entire time plaintiff PINEDO was on defendant TRANSCOR's transport vehicle, he was handcuffed, shackled, and restrained with a belly chain and chained to other inmates in a metal cage, unable to lie down, or to sleep during the entire time of his transport.

28. During his time in the transport van, plaintiff PINEDO was permitted only two opportunities to urinate but could not sit to use the toilet to defecate because the TRANSCOR personnel would not remove any of the restraints.

29. During the entire time of his transport, plaintiff PINEDO was fed only three "fast food" meals, not permitted to wash, to shower, or to change his clothes, before being delivered to Santa Barbara County Jail.

30. In or about August 2005, plaintiff TELLEZ was serving a sentence at the Federal Penitentiary in Atwater, California, when he was first picked up for transport to Clark County Detention Center. The trip on the TRANSCOR transport van took six (6) days, during which time several stops were made to pick up and discharge prisoners along the way.

31. Plaintiff TELLEZ was manacled, shackled and handcuffed during the entire time of his transport. He had limited access to toilet facilities, was not permitted to shower at any time during the six (6) day transport, and had only a restricted diet of "fast food" during the entire time on the transport van.

32. Transported in a cage, manacled, shackled, and waist chained, he was unable to lie down and deprived of sleep during the entire time of the transport.

33. Transported by TRANSCOR back to Atwater in February 2006, plaintiff TELLEZ was again subjected to the same abominable conditions he experienced on the initial trip from Atwater: transport while handcuffed, shackled and waist chained the entire time in a small metal cage in which he was unable to lie down and deprived of sleep.

34. Again, he was fed only a restricted diet of "fast food", denied bathroom breaks, and never unshackled in order to use the toilet to defecate.

35. Defendants TRANSCOR AMERICA, LLC and SGT. SMITH and OFFICER JEFF BRUMMETT and DOES 1 through 100 are jointly and severally personally responsible for the unlawful conduct of which plaintiffs complain.

36. As a result of being subjected to the harsh transportation policies, practices, or customs described herein, plaintiffs, and all those similarly situated, have suffered physical, mental, and emotional distress, invasion of privacy, and violation of due process of law and federal and state statutory and constitutional rights, and are entitled to recover damages according to proof, including exemplary damages.

CLASS CLAIMS

37. The unlawful detention and transportation, use of excessive force, and cruel and unusual punishment to which plaintiffs and all those similarly situated were subjected was performed pursuant to policies, practices, or customs of TRANSCOR AMERICA, LLC and DOES 1-10. The unlawful detention and transportation, use of excessive force, and cruel and unusual punishment complained of herein was engaged in without regard to the nature of the alleged offense for which plaintiffs, and each of those similarly situated, had been arrested, without regard to whether or not plaintiffs, and each of those similarly situated, had been convicted of any crime, and without regard to whether plaintiffs, and each of those similarly situated, had any history of violence.

38. Plaintiffs bring this action on their own behalf and on behalf of all persons similarly situated pursuant to Rule 23, Federal Rules of Civil Procedure.

39. The class is defined to include all pretrial detainees and prisoners who were transported by TRANSCOR AMERICA, LLC, its agents and/or employees, and forced to remain in the transport van for more than 24 hours, whose claims are timely under California law, including the tolling provisions of California Code of Civil Procedure sections 352 and 352.1.

40. The subclass for purposes of the Bane Act claims is all pretrial detainees and prisoners transported in California by TRANSCOR AMERICA, LLC, its agents and/or employees, and forced to remain in the transport van for more than 24 hours, whose claims are timely under California law, including the tolling provisions of California Code of Civil Procedure sections 352 and 352.1.

41. In accordance with Federal Rules of Civil Procedure, Rule 23(a), the members of the class are so numerous that joinder of all members is impractical. Plaintiffs do not know the exact number of class members. Plaintiffs are informed and believe, and thereupon allege, that more than 30,000 persons per year are transported by defendants, and that most of the trips last more than 24 hours. Plaintiffs are informed and believe, and therefore allege, that there are thousands of persons in the proposed class.

42. In accordance with Federal Rules of Civil Procedure, Rule 23(a), plaintiffs are informed and believe, and thereupon allege, that there are many facts common to the class including but not limited to: (a) whether defendants have a policy, practice, or

custom of transporting pretrial detainees and prisoners in small metal cages, wearing handcuffs, shackles, and wrist restraints, for more than 24 hours at a time; (b) whether defendants have a policy, practice or custom of providing pretrial detainees and prisoners with inadequate food; (c) whether defendants have a policy, practice or custom of providing pretrial detainees and prisoners with inadequate fluids; (d) whether defendants have a policy, practice or custom of providing pretrial detainees and prisoners with inadequate hygiene; (e) whether defendants have a policy, practice or custom of providing pretrial detainees and prisoners with inadequate exercise; and (f) whether defendants have a policy, practice or custom of providing pretrial detainees and prisoners with inadequate medical care.

43. In accordance with Federal Rules of Civil Procedure, Rule 23(a), plaintiffs are informed and believe, and thereupon allege, that there are many questions of law common to the class including but are not limited to: (a) whether transporting pretrial detainees and prisoners in metal cages, wearing handcuffs, shackles, and wrist restraints, unable to lie down or stand up for more than 24 hours at a time, violates the Fourth, Eighth, and Fourteenth Amendments; (b) whether defendants' policy, practice or custom of providing pretrial detainees and prisoners with inadequate food violates pretrial detainees' right to be free from unreasonable seizure and detention and prisoners' right to be free from cruel and unusual punishment; (c) whether defendants' policy, practice or custom of providing pretrial detainees and prisoners with inadequate fluids violates pretrial detainees' right to be free from unreasonable seizure and detention and prisoners' right to be free from cruel and unusual punishment;

(d) whether defendants' policy, practice or custom of providing pretrial detainees and prisoners with inadequate hygiene violates pretrial detainees' right to be free from unreasonable seizure and detention and prisoners' right to be free from cruel and unusual punishment; (e) whether defendants' policy, practice or custom of providing pretrial detainees with inadequate exercise violates pretrial detainees' right to be free from unreasonable seizure and detention; and (f) whether defendants' policy, practice or custom of providing pretrial detainees and prisoners with inadequate medical care violates pretrial detainees' right to be free from unreasonable seizure and detention and prisoners' right to be free from cruel and unusual punishment.

44. In accordance with Federal Rules of Civil Procedure, Rule 23(a), the claims of the representative plaintiffs are typical of the class. Representative plaintiffs have the same interests and suffered the same type of injuries as all of the class members. Plaintiffs' claims arose because of defendants' official policy, practice, or custom of subjecting detainees to unlawful transportation and detention, excessive force, and cruel and unusual punishment. Plaintiffs' claims are based upon the same legal theories as the claims of the class members. Each class member suffered actual damages as a result of being transported under the conditions imposed by TRANSCOR AMERICA, LLC.

45. In accordance with Federal Rules of Civil Procedure, Rule 23(a), the representative plaintiffs will fairly and adequately protect the class interests. Plaintiffs' interests are consistent with and not antagonistic to the interests of the class.

46. In accordance with Federal Rules of Civil Procedure, Rule 23(b)(1)(A), prosecutions of separate actions by individual members of the class would create a risk that inconsistent or varying adjudications with respect to individual members of the class would establish incompatible standards of conduct for the parties opposing the class.

47. In accordance with Federal Rules of Civil Procedure, Rule 23(b)(1)(B), prosecutions of separate actions by individual members of the class would create a risk of inconsistent adjudications with respect to individual members of the class which would, as a practical matter, substantially impair or impede the interests of the other members of the class to protect their interests.

48. In accordance with Federal Rules of Civil Procedure, Rule 23(b)(2), plaintiffs are informed and believe, and thereupon allege, that defendants have acted on grounds generally applicable to the class, thereby making appropriate the final injunctive or declaratory relief with respect to the class as a whole.

49. In accordance with Federal Rules of Civil Procedure, Rule 23(b)(3), this class action is superior to other available methods for the fair and equitable adjudication of the controversy between the parties. Plaintiffs are informed and believe, and thereupon allege, that the interests of members of the class in individually controlling the prosecution of a separate action is low, in that most class members would be unable individually to prosecute any action at all. Plaintiffs are informed and believe, and thereupon allege, that the amounts at stake for individuals are so small that separate suits would be impracticable. Plaintiffs are informed and believe, and thereupon allege, that most members of the class will not be

able to find counsel to represent them. Plaintiffs are informed and believe, and thereupon allege, that it is desirable to concentrate all litigation in one forum because it will promote judicial efficiency to resolve the common questions of law and fact in one forum, rather than in multiple courts.

50. Plaintiffs do not know the identities of all of the class members. Plaintiffs are informed and believe, and thereupon allege, that the identities of the class members may be ascertained from records maintained by defendant TRANSCOR AMERICA, LLC. Plaintiffs are informed and believe, and thereupon allege, that records maintained by defendants reflect who was subjected to transportation, from where to where, when, and for how long. Plaintiffs are informed and believe, and thereupon allege, that all of the foregoing information is contained in defendants' records and that the information necessary to identify the class members, by last known addresses, and the dates, pick-up and drop-off points, and duration of their transportation, is readily available from said records.

51. In accordance with Federal Rules of Civil Procedure, Rule 23(b)(3), class members must be furnished with the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. Plaintiffs are informed and believe, and thereupon allege, that defendants' computer records contain a last known address for class members. Plaintiffs contemplate that individual notice will be given to class members at such last known address by first class mail. Plaintiffs contemplate that the notice will inform class members of the following:

i. The pendency of the class action and the issues common to the class;

ii. The nature of the action;

iii. Their right to "opt out" of the action within a given time, in which event they will not be bound by a decision rendered in the class action;

iv. Their right, if they do not "opt out," to be represented by their own counsel and to enter an appearance in the case; otherwise they will be represented by the named class plaintiffs and their counsel; and

v. Their right, if they do not "opt out," to share in any recovery in favor of the class, and conversely to be bound by any judgment on the common issues adverse to the class.

FIRST CLAIM FOR RELIEF

(Violation Of Fourth, Eighth And Fourteenth Amendments To The U.S. Constitution On Behalf Of Plaintiffs And All Persons Similarly Situated Against Defendants TRANSCOR AMERICA, LLC And DOES 1 through 100, And Each Of Them)

52. Plaintiffs hereby incorporate herein the preceding paragraphs of this complaint, to the extent relevant, as if fully set forth.

53. Defendants' policies, practices, or customs regarding the transportation of pretrial detainees and prisoners violated the rights of plaintiffs, and the rights of each of those similarly situated, under the Fourth and Eighth Amendments to be free from unlawful detention, the use of excessive force, and cruel and unusual punishment, and violated the

rights of plaintiffs, and the rights of each of those similarly situated, under the Fourteenth Amendment to due process and privacy, and directly and proximately damaged plaintiffs, and each of those similarly situated, as herein alleged, entitling plaintiffs, and each of those similarly situated, to recover damages for said constitutional violations pursuant to 42 U.S.C. § 1983.

WHEREFORE, plaintiffs, on behalf of themselves and on behalf of all those similarly situated, pray for relief as hereunder appears.

SECOND CLAIM FOR RELIEF

(Violation Of The California State Bane Civil Rights Act, Civil Code Section 52.1, On Behalf Of Plaintiffs And All Persons Similarly Situated And Against All Defendants, And Each Of Them)

54. Plaintiffs hereby incorporate herein the preceding paragraphs of this complaint, to the extent relevant, as if fully set forth.

55. By subjecting plaintiffs, and all those similarly situated, to unlawful seizure and detention, the use of excessive force, and cruel and unusual punishment, defendants, and each of them, have interfered by threats, intimidation, or coercion with plaintiff's rights, and the rights of all those similarly situated, secured by the Constitution of the United States and the rights secured by the Constitution of California.

56. Plaintiffs, and each of the persons plaintiffs seek to represent, were harmed by defendants' interference with their aforementioned constitutional and statutory rights.

57. By using threats, intimidation and coercion to interfere with plaintiffs', and each of the persons'

plaintiffs seek to represent, aforementioned constitutional and statutory rights, defendants, and each of them, have violated California Civil Code § 52.1.

58. Defendants' violations of California Civil Code § 52.1 make them liable to each plaintiff for damages up to a maximum of three times the amount of each plaintiff's actual damages, but in no event less than four thousand dollars ($4,000), together with any attorney's fees and costs that may be determined by the court.

WHEREFORE, plaintiffs, on behalf of themselves and on behalf of all those similarly situated, pray for relief as hereunder appears.

THIRD CLAIM FOR RELIEF

(Violation Of Fourth And Fourteenth Amendments To The U.S. Constitution On Behalf Of Plaintiffs Against All Defendants, And Each Of Them)

59. Plaintiffs hereby incorporate herein the preceding paragraphs of this complaint, to the extent relevant, as if fully set forth.

60. Defendants TRANSCOR AMERICA, LLC, SGT. SMITH, OFFICER BRUMMETT, and DOES 1 through 100 acted under color of law in detaining and transporting plaintiffs in conditions that amounted to punishment, subjecting plaintiffs to excessive force, and depriving plaintiffs of adequate food, fluids, hygiene, exercise and medical care, thereby violating plaintiffs' rights under the Fourth and Fourteenth Amendments, and directly and proximately injuring plaintiffs, as herein alleged, entitling plaintiffs to recover damages for said constitutional violations pursuant to 42 U.S.C. § 1983.

61. As a proximate result of the conduct of defendants, plaintiffs suffered physical pain and emotional distress and incurred general damages for the deprivation of their constitutional rights.

62. Defendants acted in reckless and callous disregard for the constitutional rights of plaintiffs, and with willful oppression and malice. Plaintiffs therefore seek an award of punitive damages against the individual Defendants.

WHEREFORE, plaintiffs pray for relief as hereunder appears.

FOURTH CLAIM FOR RELIEF

(Violation Of Fourth And Fourteenth Amendments To The U.S. Constitution On Behalf Of Plaintiffs Against Defendants TRANSCOR AMERICA, LLC And DOES 1 through 10, And Each Of Them, For Failure To Supervise)

63. Plaintiffs hereby incorporate herein the preceding paragraphs of this complaint, to the extent relevant, as if fully set forth.

64. Plaintiffs are informed and believe, and herein allege, that defendants TRANSCOR AMERICA, LLC and DOES 1 through 10 participated in the violation of plaintiffs' rights by failing to provide adequate training, supervision, discipline, and control of their agents and employees, including defendants SGT. SMITH and OFFICER BRUMMETT, with respect to the constitutional prohibition against unreasonable searches and seizures and the appropriate use of force and by ratifying the conduct of the Defendants described in this complaint, thereby acquiescing in the deprivation of plaintiffs' rights.

WHEREFORE, plaintiffs pray for relief as hereunder appears.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs, on behalf of themselves and on behalf of all those similarly situated, seek judgment as follows:

1. For declaratory and injunctive relief declaring illegal and enjoining, preliminarily and permanently, defendants' policy, practice, or custom of transporting pretrial detainees and prisoners under the conditions described herein;

2. Certification of the action as a class action;

3. For compensatory, general, and special damages for each representative plaintiff and for each member of the class of plaintiffs, as against all defendants;

4. Exemplary damages as against each of the individual defendants in an amount sufficient to deter and to make an example of those defendants;

5. Attorneys' fees and costs under 42 U.S.C. § 1988, and California Civil

Code §§ 52 et seq.; and,

6. The cost of this suit and such other relief as the court finds just and proper.

DEMAND FOR A JURY TRIAL

Pursuant to Federal Rules of Civil Procedure 38(b), a jury trial is hereby demanded.

DATED: October 19, 2009

Respectfully submitted,

LAW OFFICE OF MARK E. MERIN

By:/s/ "Mark E. Merin"
Mark E. Merin
Attorneys for Plaintiffs

Supreme Court, U.S.
FILED
DEC 20 2010
OFFICE OF THE CLERK

No. 10-468

In The Supreme Court of the United States

TRANSCOR AMERICA, LLC, et al.,

Petitioners,

v.

KEVIN M. SCHILLING, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ANDREW C. SCHWARTZ*
CA[illegible] MEADOWS,
SC[illegible]WARTZ & COOK
2121 No. California Blvd.,
Suite 1020
Walnut Creek, CA 94596
(925) 947-1147
Schwartz@cmslaw.com

MARK E. MERIN
LAW OFFICES OF
MARK E. MERIN
2001 P St., Suite 100
Sacramento, CA 95814
(916) 443-6911
Mark@markmerin.com

KAREN L. SNELL
Attorney at Law
102 Buena Vista Terr.
San Francisco, CA 94117
(415) 225-7592
ksnell@snell-law.com

**Counsel of Record*

Attorneys for Respondents

December 2010

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Did the court of appeals abuse its discretion in denying Petitioners' petition to appeal pursuant to Federal Rules of Civil Procedure, Rule 23(f)?

a. Did the court of appeals abuse its discretion in denying interlocutory review of the district court's interpretation of the Prison Litigation Reform Act's physical injury requirement, 42 U.S.C. § 1997e(e)?

b. Did the court of appeals abuse its discretion in denying interlocutory review of the district court's finding that class issues predominate over individual issues in this case?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	5
I. INTRODUCTION	5
II. THE QUESTIONS PRESENTED BY PETITIONERS ARE NOT PROPERLY BEFORE THE COURT	7
III. THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN DENYING REVIEW OF THE DISTRICT COURT'S INTERPRETATION OF THE PLRA'S PHYSICAL INJURY REQUIREMENT	10
IV. THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN DENYING REVIEW OF THE DISTRICT COURT'S FINDING THAT CLASS ISSUES PREDOMINATE OVER INDIVIDUAL ISSUES IN THIS CASE	14
CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES

Casale v. Kelly, 257 F.R.D. 396 (S.D.N.Y. 2009) 16

Chamberlan v. Ford Motor Company, 402 F.3d 952 (9th Cir. 2005) 8, 9

Hagan v. Rogers, 570 F.3d 146 (3rd Cir. 2009).....16

Harper v. Showers, 174 F.3d 716 (9th Cir. 1999).....15

Holt v. Sarver, 300 F. Supp. 825 (D.C. Ark. 1969) 17

In re Nassau County Strip Search Cases, 2010 WL 3781563 (E.D.N.Y.).....12, 13

J.D. v. Nagan, 255 F.R.D. 406 (E.D. La. 2009).....17

Johnson v. Lewis, 217 F.3d 726 (9th Cir. 2000).....17

Jones v. Bock, 549 U.S. 199 (2007) 11

Jorden v. Arnold, 408 F. Supp. 868 (M.D. Pa. 1976) 17

Kelsey v. County of Scholharie, 2007 WL 603406 (N.D.N.Y.), *reversed on other grounds*, 567 F.3d 54 (2d Cir. 2009).....12

Poulos v. Caesars World, Inc., 379 F.3d 654 (9th Cir. 2004) 9

Robinson v. Page, 170 F.3d 747 (7th Cir. 1999).....14

Rose v. Saginaw County, 232 F.R.D. 267 (E.D. Mich. 2005).....13

Shin v. Cobb County Bd. of Education, 248 F.3d 1061 (11th Cir. 2001).....9

TABLE OF AUTHORITIES – Continued

Page

Stewart v. Winter, 669 F.2d 328 (5th Cir. 1982).....18

Thomas v. Baca, 231 F.R.D. 397 (C.D. Cal. 2005).....16

Thomas v. Baca, 54 F.Supp.2d 1201 (C.D. Cal. 2007).....15

Turner v. Grant County, 2008 WL 821895 (E.D. Ken. 2008).....13

Tyler v. Suffolk County, 253 F.R.D. 8 (D. Mass. 2008).....17

Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935 (9th Cir. 2009).....9

Waste Management Holdings, Inc. v. Mowbray, 208 F.3d 288 (1st Cir. 2000).....10

Zehner v. Trigg, 952 F.Supp. 1318 (S.D. Ind. 1997).....13

STATUTES AND RULES

42 U.S.C. § 1983 16

42 U.S.C. § 1997e(e) .....*passim*

42 U.S.C. § 1997e(h) 11

OTHER AUTHORITIES

Eighth Amendment 15

Fourteenth Amendment 15

Fed. R. Civ. P. 23, 1998 Amendments 8

TABLE OF AUTHORITIES – Continued

Page

Fed. R. Civ. P. 23(a) 11

Fed. R. Civ. P. 23(b)(3) ..... *passim*

Fed. R. Civ. P. 23(c)(4)(A) 18

Fed. R. Civ. P. 23(d) 9

Fed. R. Civ. P. 23(f) ..... *passim*

Supreme Court Rule 10 6

Supreme Court Rule 10(a)(c) 6

Wright, Miller & Kan, 7AA *Federal Practice and Procedure*, § 1778 18

STATEMENT OF THE CASE

On February 8, 2008, Respondent Kevin Schilling filed a class action complaint alleging that his constitutional rights, and the rights of others similarly situated, had been violated by the policies and practices of Petitioner TransCor America, LLC ("TransCor"), a private company that transports inmates on behalf of local, county, state, and federal agencies. Mr. Schilling alleged that when TransCor transported him and other inmates for more than 24 continuous hours locked in cages, restrained them in handcuffs, leg irons, belly chains, chains connecting them to one another, and black boxes immobilizing their wrists, denied them rest in a bed, allowed them only restricted access to a toilet, denied them access to sanitation facilities, and fed them inadequate food, it deprived them of something sufficiently serious to violate the Eighth and Fourteenth Amendments to the United States Constitution. Mr. Schilling was a pretrial detainee at the time he was transported by TransCor. The class action complaint was subsequently amended to add two other named plaintiffs, John Pinedo and William Tellez, who were sentenced prisoners at the time they were transported by TransCor.

After conducting relevant discovery, Respondents moved for certification of the class. The district court granted Respondents' motion in part and denied it in part.

In its order, the district court considered and rejected Petitioners' argument that the class could

not be certified because the Prison Litigation Reform Act ("PLRA") requires a prior showing of physical injury, and the class might include prisoners who were not injured. Notably, Petitioners do not contest that each of the three named plaintiffs, Kevin Schilling, John Pinedo and William Tellez, made the showing required by the PLRA. Nor do they argue that the district court erred in concluding that the named plaintiffs' claims are typical of those of the class.[1]

---

[1] Petitioners imply that there may be a substantial number of prisoners who did not suffer physical injuries, when there is no evidence to support this claim. Their sanitized version of the facts should not be allowed to mislead the Court.

For example, Petitioners minimize the effect of their restraints when applied for more than 24 continuous hours. Petitioners would have the Court believe that the restraints are removed or loosened when an inmate's limbs become swollen or numb or they suffer abrasions. In fact, restraints can only be modified when a TransCor extradition agent is given written permission to modify them by the home office, and TransCor's person most knowledgeable about such practices testified it is almost never given.

Petitioners also minimize the extent to which TransCor's policies and practices interfere with the inmates' basic human need to sleep. TransCor's policy is to advise inmates that "if you sleep, you sleep sitting up in your seat." Because transport vehicles do not have seatbelts, an inmate risks injury if he falls asleep and the vehicle makes a sudden stop.

Petitioners also misleadingly describe the chemical toilets Respondents were able to use only when accompanied by an extradition agent, and were forced to use while still in restraints and chained to one another, and which lack running water or any means of maintaining sanitation, as "bathrooms".

The district court also considered and rejected Petitioners' argument that the commonality/predominance requirement of Rule 23(b)(3) had not been met. The district court concluded that the predominant question in this case, which is shared by all class members, is "whether inmates who have been transported for more than 24 hours and who are not allowed to sleep overnight have been deprived of something 'sufficiently serious'" to violate the Eighth and Fourteenth Amendments. Petition, p. 22a.

The district court certified a class of:

> All pretrial detainees and prisoners who were transported by TransCor America, LLC, its agents and/or employees between February 14, 2006 and the present, and who were forced to remain in restraints in the transport vehicle for more than 24 hours without being allowed to sleep overnight in a bed. The class includes pretrial detainees and prisoners who were removed from one transport vehicle and placed directly onto another, without being housed overnight, whose combined trip lasted more than 24 hours. The class only includes those pretrial detainees and prisoners who were transported by TransCor on behalf of a state agency, and does not include pretrial detainees and prisoners who were transported on behalf of a federal agency.

Petition, p. 26a.

TransCor's records show that it filled 22,367 orders for the transportation of pretrial detainees and prisoners where at least one leg of the journey lasted for more than 24 hours between February 14, 2006 and the time the class certification motion was filed. Approximately 19,000 trips lasted 24 to 48 hours; 7700 lasted 48 to 72 hours; 1700 lasted 72 to 96 hours; 71 lasted 96 to 120 hours; and four lasted 120 to 143.75 continuous hours. These numbers include individual legs of trips only. Approximately one-third of the prisoners transported are represented more than once because they were transferred from one vehicle to another for an additional leg of more than 24 hours. TransCor has estimated that the total number of members of the proposed class is approximately 16,000.

Petitioners petitioned the court of appeals to permit an appeal from the district court's class certification order under Rule 23(f). The court of appeal denied their request. They then petitioned for rehearing *en banc*. That petition was denied as well. They now petition this Court for interlocutory review of the class certification order. To date, Petitioners have not moved the district court to reconsider or modify its order certifying the class.

REASONS FOR DENYING THE WRIT

I. INTRODUCTION

Petitioners' displeasure with the United States court of appeals' denial of their petition to appeal the district court's order certifying the class pursuant to Federal Rules of Civil Procedure, Rule 23(f), does not warrant this Court's review.

Rule 23(f) gives the courts of appeals "unfettered discretion" in deciding whether to grant or deny petitions for permission to appeal class certification orders. The Ninth Circuit has adopted standards for deciding whether to grant Rule 23(f) appeals. Petitioners have not shown that the court of appeals failed to comply with its standards in this case or that the court's standards misconstrue the Rule or materially conflict with the standards adopted by other courts of appeals.

The district court's class certification order was consistent with both the PLRA and Rule 23(b)(3). Petitioners concede that the named plaintiffs, who "brought" this suit (*see* 42 U.S.C. § 1997e(e)), meet the PLRA requirements, establishing that the suit is not frivolous. Allowing the class to include prisoners who may not have suffered physical injury does not detract from the statute's goal of filtering out frivolous actions. Nor is such a ruling in conflict with the ruling of any other court that has ruled on the issue, as a close reading of Petitioners' authorities reveals.

The district court's application of Rule 23(b)(3)'s predominance requirement also withstands scrutiny. Respondents challenge Petitioners' system-wide policies and practices for transporting inmates, providing a more than adequate basis for class certification under Rule 23(b)(3). The district court identified specific fact and legal questions that are common to all class members and predominate over individual issues. The court's ruling is not in conflict with that of any other court as, once again, a close reading of Petitioners' authorities reveals.

Petitioners do not argue that the court of appeals' denial of their petition to appeal under Rule 23(f) "has decided an important question of federal law that has not been but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). Nor do they argue that the Ninth Circuit order "conflicts with the decision of another circuit on the same important matter." Supreme Court Rule 10(a). Petitioners' failure to make these showings compels denial of their Petition for A Writ of Certiorari ("Petition").

For all the reasons stated herein, the Petition should be denied.

II. THE QUESTIONS PRESENTED BY PETITIONERS ARE NOT PROPERLY BEFORE THE COURT

The Petition was triggered by the court of appeals' denial of Petitioners' petition for permission to file an appeal pursuant to Federal Rules of Civil Procedure, Rule 23(f).[2] Petitioners' "Questions Presented" purport to challenge the district court's order certifying the class, but the actual question presented is whether the court of appeals abused its discretion in denying Petitioners' petition to appeal pursuant to Rule 23(f).

The Petition provides no compelling reason for the Court to conclude that the court of appeals abused its discretion. *See* Supreme Court Rule 10. It does not address the application of Rule 23(f). It does not address the standards adopted by the Ninth Circuit for implementing Rule 23(f). And it does not show a conflict between the Ninth Circuit's standards and those adopted by other courts.

---

[2] Federal Rules of Civil Procedure, Rule 23(f), states:

> **(f) Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Fed. R. Civ. P. 23(f).

The Committee Notes accompanying the 1998 Amendments to Rule 23, which added Rule 23(f), give the courts of appeals the broadest possible discretion to grant or deny an interlocutory appeal of a class certification order. They provide that "[a]ppeal from an order granting or denying class certification is permitted in the *sole discretion* of the court of appeals. . . . The court of appeals is given *unfettered discretion* whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari. . . . Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive." Fed. R. Civ. P. 23, Committee Notes, 1998 Amendments (emphasis added).

The Committee anticipated that "the circuit courts will develop standards for granting review that reflect the changing areas of uncertainty in class litigation." Fed. R. Civ. P. 23, 1998 Amendments. And, in *Chamberlan v. Ford Motor Company*, 402 F.3d 952 (9th Cir. 2005), the Ninth Circuit did just that. *Chamberlan v. Ford Motor Company*, 402 F.3d at 959. The court of appeals found that, ordinarily, Rule 23(f) review is warranted only if: "(1) there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade

end-of-the-case review; or (3) the district court's class certification decision is manifestly erroneous." *Id.*

Chamberlan illustrates that the Ninth Circuit will grant permission to appeal under Rule 23(f) in an appropriate case. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952. In that case, the court of appeals granted the defendants' petition for Rule 23(f) review, and class certification was affirmed. *See also Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 939 (9th Cir. 2009) (interlocutory appeal permitted; denial of class action certification affirmed); *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 659 (9th Cir. 2004) (permission to appeal granted; denial of class certification affirmed). Petitioners simply failed to show the court of appeals that this is an appropriate case. They did not argue that this is a "death-knell" situation. They did not explain why the rulings they challenge are likely to evade end-of-the-case review. And they did not present a convincing case that the district court's class certification decision was manifestly erroneous.

If Petitioners are unhappy with the definition of the class, they are free to move the district court to modify it, or to reconsider its order. *See* Fed. R. Civ. P. 23(d). Appeal is premature. In this case, where discovery is still open, as in *Shin v. Cobb County Bd. of Education*, 248 F.3d 1061 (11th Cir. 2001), the scope and contour of the class may change radically as discovery progresses and more information is gathered about the nature of the putative class members' claims. *Shin v. Cobb County Bd. of Education*, 248

F.3d at 1064. "Because the district court retains the ability, and perhaps even a duty, to alter or amend a certification decision, a motion for reconsideration of a class certification order is a better way to correct any errors in the certification order or to recognize the importance of new facts." *Id. See also Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000) ("We should err, if at all, on the side of allowing the district court an opportunity to fine-tune its class certification order rather than opening the door too widely to interlocutory appellate review.").

For all the foregoing reasons, the Petition should be denied.

III. THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN DENYING REVIEW OF THE DISTRICT COURT'S INTERPRETATION OF THE PLRA'S PHYSICAL INJURY REQUIREMENT

The court of appeals did not abuse its discretion in denying Petitioners' petition to appeal the district court's interpretation of the Prison Litigation Reform Act's physical injury requirement. *See* 42 U.S.C. § 1997e(e). The district court's interpretation of the PLRA is in accord with both the Act's plain language and the legislative intent. It certainly does not meet the "manifestly erroneous" standard for discretionary review under Rule 23(f).

The PLRA was enacted by Congress in an effort to address the large number of prisoner complaints filed in federal court. *Jones v. Bock*, 549 U.S. 199, 202 (2007). Congress' challenge was to ensure "that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit." *Jones v. Bock*, 549 U.S. at 202. "What the country needs, Congress decided, is fewer and better prisoner suits." *Id.* at 203.

Congress sought to meet this challenge by enacting a variety of reforms "designed to filter out the bad claims and facilitate consideration of the good." *Id.* at 203-204. One of the "filters" is codified in 42 U.S.C. § 1997e(e). Section 1997e(e) provides that "[n]o civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e).[3]

Petitioners do not dispute that each of the named plaintiffs made the "prior showing of physical injury" required by the PLRA. It is the named plaintiffs who "bring" a class action suit. *See* Fed. R. Civ. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all

---

[3] A "prisoner" is defined as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." 42 U.S.C. § 1997e(h).

members . . . "). The district court's conclusion that the PLRA requirement had been satisfied is in accord with the plain language of the statute. *See* 42 U.S.C. § 1997e(e). The district court's conclusion is also in accord with the legislative intent. It "ensures that the lawsuit is not frivolous, and requiring every member to meet the prior showing of physical injury requirement would not reduce prisoner litigation." Petition, App. A, p. 13a.

There is no conflict among the courts that have addressed the requirement set forth in Section 1997e(e) of the PLRA. *See In re Nassau County Strip Search Cases,* 2010 WL 3781563 (E.D.N.Y.); *Kelsey v. County of Scholharie,* 2007 WL 603406 (N.D.N.Y.), *reversed on other grounds*, 567 F.3d 54 (2d Cir. 2009). In *Kelsey v. County of Scholharie,* the court held that the named plaintiffs were adequate representatives of the class, even though they were not in custody at the time they filed suit, and the PLRA did not apply to them. The court reasoned that "no other potential class members commenced this suit, although they may join the class. The language of § 1997e(e) requires a showing of physical injury in suits brought, i.e. commenced or filed, by prisoners, not those in which they join as members of a class action." *Kelsey v. County of Scholharie,* 2007 WL 603406, at *11. And, in *In re Nassau County Strip Search Cases,* the court held that Section 1997e(e) of the PLRA was inapplicable to individual class members where the named plaintiffs were not incarcerated when the

class action complaint was filed. *In re Nassau County Strip Search Cases,* 2010 WL 3781563, at * 7-8.

Zehner v. Trigg, 952 F.Supp. 1318 (S.D. Ind. 1997), cited by Petitioners, is not on point. In *Zehner,* the court did not address the issue of whether every member of the proposed class or only the named plaintiffs must satisfy the "physical injury" requirement of the PLRA. Rather, the court granted the defendants' motion for judgment on the pleadings because the plaintiffs had "made it clear . . . that they do not seek to prove that *any* class member currently suffers from any physical malady or symptoms caused by the alleged exposure to asbestos." *Zehner,* 952 F.Supp. at 1322 n.2 (emphasis added). The language from *Zehner* quoted by Petitioners is taken out of context. It is from the part of the decision in which the Southern District of Indiana reaches the minority position that the PLRA's requirement that prisoners exhaust administrative remedies applies to former prisoners. *See Rose v. Saginaw County,* 232 F.R.D. 267, 276 (E.D. Mich. 2005).

Turner v. Grant County, 2008 WL 821895 (E.D. Ken. 2008), is equally unhelpful to Petitioners. In *Turner* the court mused that class certification might not be appropriate because PLRA issues would surface if the class were to include present inmates seeking monetary damages under circumstances where physical injury was not evident. *Turner,* 2008 WL 821895 at *20. But the court found no need to engage in a "protracted analysis" of this question because the proposed class failed to satisfy the basic

requirements of Rule 23(b)(3). *Id.* Had the court's "protracted analysis" included a closer look at the plain language of Rule 23(f), it may have ended up where the district court did in this case.

Finally, it is premature to address the question of whether the class members satisfy the physical injury requirement. *See Robinson v. Page,* 170 F.3d 747, 749 (7th Cir. 1999). Petitioners concede that the named plaintiffs made the requisite showing of physical injuries, and Petitioners have not contested the typicality of the named plaintiffs' physical injury claims. The Court should not be misled by Petitioners' sanitized Statement of the Case. There is currently no basis for concluding that there are any class members, let alone a substantial number, who suffered no physical injuries.

The Petition for a Writ of Certiorari should be denied.

IV. THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN DENYING REVIEW OF THE DISTRICT COURT'S FINDING THAT CLASS ISSUES PREDOMINATE OVER INDIVIDUAL ISSUES IN THIS CASE

The Ninth Circuit did not abuse its discretion in denying Petitioners' petition to appeal the case based on the district court's finding that class issues predominate over individual issues. The district court's finding was correct. It certainly does not meet the

"manifestly erroneous" standard for discretionary review under Rule 23(f).

Petitioners' argument that the district court "eliminated" the predominance requirement of Rule 23(b)(3) is nonsense. The district court found that all class members share in common the question, "whether inmates who have been transported for more than 24 hours and who are not allowed to sleep overnight have been deprived of something 'sufficiently serious'" to violate the Eighth and Fourteenth Amendments. Petition, App. A, p. 22a. Sleep has been recognized as a basic human need, the deprivation of which may give rise to an Eighth and Fourteenth Amendment violation. *See Harper v. Showers,* 174 F.3d 716, 720 (9th Cir. 1999) ("sleep undoubtedly counts as one of life's basic needs"); *Thomas v. Baca,* 54 F.Supp.2d 1201, 1216 (C.D. Cal. 2007) ("[A]ccess to a bed is an integral part of the 'adequate shelter' mandated by the Eighth Amendment . . . [P]risons may not deprive those in their care of a basic place to sleep. . . ."). And, while the parties disputed some of TransCor's policies and practices, regarding, for example, how frequently inmates were allowed to use the toilet and how much food and water they were provided with, there was no dispute that TransCor denied all class members sleep in a bed for more than 24 hours.

Petitioners barely mention the facts of this case. Instead, they argue generically that "prisoner conditions of confinement claims are inherently case specific," and that "these types of cases simply cannot

meet Rule 23(b)(3)'s predominance requirement." But the case law does not bear them out. Many civil rights cases challenging system-wide policies or practices have been certified as class actions despite various potential factual distinctions. For example, in *Hagan v. Rogers,* 570 F.3d 146 (3rd Cir. 2009), the court certified a class of prisoners who alleged that they were subject to injury or threat of injury by prison officials' purported deliberate indifference to their exposure to a serious communicable skin disease. The court found that the class satisfied the typicality and commonality requirements for certification even though the class would include prisoners who suffered life-threatening injuries and prisoners who had not yet suffered physical injuries, and treatment would vary among prisoners, since the constitutional harm complained of was typical for and common to all prisoners in the class. *Hagan v. Rogers,* 570 F.3d at 158. And, in *Thomas v. Baca,* 231 F.R.D. 397 (C.D. Cal. 2005), the court certified a class of county jail detainees and former detainees who alleged that their Eighth and Fourteenth Amendment rights had been violated when they were forced to sleep on the floor of the county jails. The court found that the class satisfied the commonality requirement because the central issues for every class member were the fact question of whether they had been required to sleep on the floor and the legal question of whether that fact permitted recovery under Section 1983, while individualized questions were peripheral. *See also Casale v. Kelly,* 257 F.R.D. 396 (S.D.N.Y. 2009) (arrestees satisfied the predominance requirement for

class certification where all shared the legal issue of whether the police commissioner, police department, city, and various police personnel violated their Fourth, Fifth, and Fourteenth Amendment rights by enforcing loitering provisions long deemed unconstitutional); *J.D. v. Nagan,* 255 F.R.D. 406 (E.D. La. 2009) (juvenile detainees satisfied commonality requirement for class certification where all were subjected to the same policies, practices and conditions of confinement, and the same violations of federal and state law constituted the core of each member's claim); *Tyler v. Suffolk County,* 253 F.R.D. 8 (D. Mass. 2008) (state prison inmates and former inmates satisfied the commonality requirement for class certification where all were subject to the same allegedly unlawful policy of restricted access to toilet facilities).

The cases Petitioners cite are inapposite. For the most part, they are either prison condition cases that were not class actions, or class actions that were not prison condition cases. In three of the four that were both, the courts' rulings actually support Respondents' position. *See Johnson v. Lewis*, 217 F.3d 726 (9th Cir. 2000) (court of appeal reversed summary judgment in favor of prison authorities in two consolidated class actions that arose after Arizona prison authorities removed prisoners and placed them in the out-of-doors, exposed to the elements, in response to two separate disturbances inside the prison); *Jorden v. Arnold,* 408 F. Supp. 868 (M.D. Pa. 1976) (district court addressed a variety of prison conditions following certification of a class); *Holt v. Sarver,* 300

F. Supp. 825 (D.C. Ark. 1969) (district court permitted actions challenging conditions at two Arkansas penal facilities to be prosecuted as class actions). The fourth case, *Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982), is distinguishable. The plaintiffs in *Stewart* attacked the conditions in 82 separate Mississippi county jails. The court of appeals affirmed the denial of class certification because the plaintiffs "ha[d] identified no practice or condition common to all the jails which would allow the district court to maintain the class action 'with respect to particular issues' under Rule 23(c)(4)(A)." *Stewart v. Winter,* 669 F.2d at 336 & n.19.

Respondents have challenged Petitioner Trans-Cor's system-wide policies and practices that deprive inmates of rest in a bed for more than 24 hours. "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." Wright, Miller & Kan, 7AA *Federal Practice and Procedure*, § 1778. This is precisely the kind of case where class certification is justified.

The Petition for a Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ANDREW C. SCHWARTZ*
CASPER, MEADOWS,
SCHWARTZ & COOK
2121 No. California Blvd.,
Suite 1020
Walnut Creek, CA 94596
(925) 947-1147
Schwartz@cmslaw.com

KAREN L. SNELL
Attorney at Law
102 Buena Vista Terr.
San Francisco, CA 94117
(415) 225-7592
ksnell@snell-law.com

*Counsel of Record

MARK E. MERIN
LAW OFFICES OF
MARK E. MERIN
2001 P St., Suite 100
Sacramento, CA 95814
(916) 443-6911
Mark@markmerin.com

Attorneys for Respondents

December 2010

No. 10-468

IN THE

Supreme Court of the United States

TRANSCOR AMERICA, LLC, *et al.*,
Petitioners,

v.

KEVIN M. SCHILLING, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

DANIEL P. STRUCK *
EILEEN DENNIS GILBRIDE
NICHOLAS D. ACEDO
JONES, SKELTON & HOCHULI, P.L.C.
2901 North Central Avenue, Suite 800
Phoenix, AZ 85012
(602) 263-1700
DStruck@Jshfirm.com

* Counsel of Record

Counsel for Petitioners

January 19, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR PETITIONERS	1
ARGUMENT	1
I. THE ISSUES PRESENTED ARE PROPERLY BEFORE THIS COURT	1
II. PUTATIVE CLASS MEMBERS ARE NOT EXEMPT FROM THE PLRA'S PHYSICAL INJURY REQUIREMENT	4
III. RULE 23(B)(3)'S PREDOMINANCE REQUIREMENT APPLIES TO PRISONER CONDITIONS OF CONFINEMENT CASES	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES Page

Amchem Products Inc. v. Windsor, 521 U.S. 591 (1997) 8
Califano v. Yamasaki, 442 U.S. 682 (1979) ... 5
Caperton v. A. T. Massey Coal Co., 129 S. Ct. 2252 (2009) 3
Chamberlan v. Ford Motor Co., 402 F.3d 952 (9th Cir. 2005) 2, 3
Casale v. Kelly, 257 F.R.D. 396 (S.D.N.Y. 2009) 8
Granny Goose Foods v. Bhd. of Teamsters & Auto Truck Drivers, 415 U.S. 423 (1974) 5
Hagan v. Rogers, 570 F.3d 146 (3rd Cir. 2009) 8
Hyde v. Shine, 199 U.S. 62 (1905) 5
In re Nassau County Strip Search Cases, No. 99–CV–2844, 2010 WL 3781563 (E.D.N.Y. Sept. 22, 2010) 6
J.D. v. Nagin, 255 F.R.D. 406 (E.D. La. 2009) 8
Kelsey v. County of Schoharie, No. 1:04–CV–299, 2007 WL 603406 (N.D.N.Y Feb. 21, 2007) 6
Malone v. Becher, No. NA 01–101–C H/H, 2003 WL 22080737 (S.D. Ind. Aug. 29, 2003) 6
Phipps v. Sheriff of Cook County, 681 F. Supp. 2d 899 (N.D. Ill. 2009) 6
Shook v. El Paso County, 386 F.3d 963 (10th Cir. 2004) 5
Thomas v. Am. Home Products, Inc., 519 U.S. 913 (1996) 3

TABLE OF AUTHORITIES—Continued

	Page
Turner v. Grant County Det. Ctr., No. 05–148–DLB, 2008 WL 821895 (E.D. Ky. Mar. 26, 2008)	6-7
United States v. Young, 470 U.S. 1 (1985)	3
Zehner v. Trigg, 952 F. Supp. 1318, *aff'd*, 133 F.3d 459 (7th Cir. 1997)	6
CONSTITUTION	
U.S. Const. amend. VIII	2
STATUTES	
8 U.S.C. § 1252(e)(1)(B)	5
18 U.S.C. § 3626(a)(3)	5
18 U.S.C. § 3626(c)	5
18 U.S.C. § 3626(f)	5
42 U.S.C. § 1997e(e)	1, 3, 4, 5, 6
RULES	
Fed. R. App. P. 35	2
Fed. R. App. P. 35(c)	2
Fed. R. Civ. P. 23	2, 5, 8
Fed. R. Civ. P. 23(a)	4
Fed. R. Civ. P. 23(b)(2)	8
Fed. R. Civ. P. 23(b)(3)	1, 2, 3, 7, 8
Fed. R. Civ. P. 23(f)	2, 3
Ninth Circuit Rule 27–10	2
Sup. Ct. R. 10	3
Sup. Ct. R. 10(a)	3
Sup. Ct. R. 10(c)	3

IN THE

Supreme Court of the United States

No. 10-468

TRANSCOR AMERICA, LLC, *et al.*,
Petitioners,

v.

KEVIN M. SCHILLING, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

ARGUMENT

I. THE ISSUES PRESENTED ARE PROPERLY BEFORE THIS COURT[1]

The Petition for a Writ of Certiorari presents two questions for this Court's consideration, one involving the application of 42 U.S.C. § 1997e(e) in a prisoner class action lawsuit, and one involving the application of Fed. R. Civ. P. 23(b)(3), to prisoner conditions of confinement cases. The district court erroneously

[1] Respondents do not challenge this Court's jurisdiction or the timeliness of the Petition for a Writ of Certiorari.

answered these questions, the first in contravention of the statute's plain language, in violation of the Rules Enabling Act, and contrary to Congress' intent and sound public policy, and the second in violation of Rule 23's explicit requirements and Eighth Amendment jurisprudence. The district court's holdings also conflict with decisions by this Court and other lower federal courts.

Petitioner challenged these holdings in the Ninth Circuit Court of Appeals, initially pursuant to Fed. R. Civ. P. 23(f), and subsequently under Fed. R. App. P. 35 and Ninth Circuit Rule 27–10. The Rule 23(f) petition addressed the showing necessary under *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005), and argued that the PLRA issue presented an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, and the Rule 23(b)(3) determination was manifestly erroneous.[2] The petition for rehearing en banc addressed the showing necessary under Rule 35(c), and argued that the PLRA issue involved a question of exceptional importance, and that the Rule 23(b)(3) holding conflicted with other federal court decisions.

Respondents' suggestion that Petitioners did not raise these issues below is not true. They were properly raised. Respondents' contention that this interlocutory appeal is "premature" also lacks support.

---

[2] Under *Chamberlan*, these categories are merely guidelines, and do not constitute an exhaustive list of factors, nor do they circumscribe the court's discretion in granting a petition. 402 F.2d at 960. Permission to appeal under Rule 23(f) may be granted "on the basis of any consideration that the court of appeals finds persuasive." Advisory Comm. Note to Fed. R. Civ. P. 23(f).

Petitioners are not required to first seek reconsideration of the class definition in the district court. Such motions are not a prerequisite to either a Rule 23(f) petition or a petition for writ of certiorari. And no amount of fact discovery will alter the district court's purely legal conclusion that § 1997e(e)'s "physical injury" requirement does not apply to putative class members.

Respondents' fixation on Rule 23(f), the *Chamberlan* test, and the "abuse of discretion" standard of review is also misplaced. The Ninth Circuit's post-card denials make it impossible to frame the discussion in these terms. The focus is properly on the district court's erroneous holdings.[3] *See Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252, 2274 (2009) (Scalia, J., dissenting) ("The principle purpose of this Court's exercise of its certiorari jurisdiction is to clarify the law."); *United States v. Young*, 470 U.S. 1, 34 (1985) (Brennan, J., dissenting) ("[T]he function of this Court is . . . to resolve important questions of federal law . . . . Our institutional role properly is

---

[3] Respondents boast that the Petition fails to articulate the reasons listed in Supreme Court Rule 10 that support granting a writ of certiorari. The Petition is plain enough, but, at the risk of stating the obvious, the Petition should be granted because the lower courts' Rule 23(b)(3) holding is in conflict with other federal circuit and district court decisions, and the PLRA holding involves an important question of federal law that has not been, but should be, settled by this Court. *See* Supreme Court Rule 10(a) & (c). Both holdings also conflict with relevant decisions of this Court. *Id.* Respondents note that, although Supreme Court Rule 10 outlines the "character of the reasons the Court considers" in deciding whether to grant certiorari, it does not "control nor fully measure the Court's discretion." *Thomas v. Am. Home Products, Inc.*, 519 U.S. 913, 914 (1996) (Scalia, J., concurring).

focused on ensuring clarity and uniformity of legal doctrine."). Respondents' challenge places form over substance. The issues are properly before this Court, and the Petition provides compelling reasons to grant a writ of certiorari.

II. PUTATIVE CLASS MEMBERS ARE NOT EXEMPT FROM THE PLRA'S PHYSICAL INJURY REQUIREMENT

Respondents extrapolate an exception for class members from the word "brought." *See* 42 U.S.C. § 1997e(e) ("No Federal civil action may be *brought* by a prisoner . . . for mental or emotional injury suffered while in custody without a prior showing of physical injury.") (Emphasis added). They argue that, because only *their* names appear on the caption of the complaint (as class representatives), *they* are the ones who "brought" the action for purposes of the PLRA; thus, the physical injury requirement applies only to them.[4] This strained interpretation ignores the derivative nature of class action lawsuits.

A class action is an action brought by one or more class members "on behalf of all members." Fed. R. Civ. P. 23(a). The named plaintiffs are merely "representative parties" of the class. *Id.* Indeed, Respondents' complaint explicitly states that they "bring this action on their own behalf *and on behalf of all persons similarly situated.*" (Pet. App. 51a, emphasis added.) Thus, a class action is "brought" not only by

---

[4] Petitioners strongly dispute that Respondents satisfy the physical injury and typicality requirements. The former will be the subject of a summary judgment motion following discovery. The latter was refuted, albeit unsuccessfully, in Petitioners' opposition to the motion for class certification. Neither issue has any relevance to the discrete issue before this Court.

the class representatives, but also by the class members. *See Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) (Rule 23 provides a procedure by which the court may exercise jurisdiction over various individual claims in a single proceeding).

In drafting § 1997e(e), Congress obviously recognized the availability of class action lawsuits by prisoners challenging the conditions of their confinement because it included other provisions relating to the administration of class actions. *See Shook v. El Paso County*, 386 F.3d 963, 970 & n.3 (10th Cir. 2004) (citing 18 U.S.C. § 3626(a)(3), –(c), –(f)). Yet, it declined to carve out an exception for class actions or for class members in § 1997e(e), and instead made the physical injury requirement applicable to *all* "prisoner[s]" in a "Federal civil action." *Cf.* 8 U.S.C. § 1252(e)(1)(B) (explicitly prohibiting class actions under statute). The district court created an exception that does not and should not exist. *See Granny Goose Foods v. Bhd. of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 435 (1974) (interpreting statute in a manner that placed it in harmony with rule of civil procedure); *Hyde v. Shine*, 199 U.S. 62, 78 (1905) ("Where the statute contains no exception, the courts cannot create one.").

Respondents offer no other support for the district court's holding. They do not dispute that creating an exception to § 1997e(e) for putative class members would violate the Rules Enabling Act and is bad public policy. And in response to Petitioners' argument that creating such an exception would undermine the statute's purpose, Respondents simply quote the district court's ruling. Petitioners have already demonstrated that an exception for class members is inconsistent with Congress' intent. The cases

Respondents rely on are also unavailing. *Kelsey v. County of Schoharie*, No. 1:04–CV–299, 2007 WL 603406, at *11 (N.D.N.Y Feb. 21, 2007) does not provide any analysis for its conclusion, and instead relies solely on the word "brought." *In re Nassau County Strip Search Cases*, No. 99–CV–2844, 2010 WL 3781563, at **7–8 (E.D.N.Y. Sept. 22, 2010) simply relied on the holding in *Kelsey*.[5] Neither case presents a convincing argument for an exception to the statute.[6]

---

[5] Ironically, the court in *Nassau* refused to consider two cases cited by the defendants which reached the opposite conclusion, stating that, "[i]n both cases the courts merely state a conclusion without any analysis." *See Id.* at **7–8 (refusing to consider holdings in *Phipps v. Sheriff of Cook County*, 681 F. Supp. 2d 899 (N.D. Ill. 2009) and *Malone v. Becher*, No. NA 01–101–C H/H, 2003 WL 22080737 (S.D. Ind. Aug. 29, 2003)).

[6] Respondents' attempt to distinguish Petitioners' cases is also unavailing. It is Respondents who take the holding in *Zehner v. Trigg*, 952 F. Supp. 1318, *aff'd*, 133 F.3d 459 (7th Cir. 1997) out of context. The plaintiffs represented a class of prisoners who allegedly worked in the correctional facility's kitchen and were exposed to asbestos. *Id.* at 1320. The defendants moved to dismiss the complaint because the plaintiffs did not allege a physical injury. *Id.* The plaintiffs conceded that none of the class members "currently" suffered from any physical injury, but argued that the PLRA (and physical injury requirement) did not apply to those prisoners who had been released from prison at the time the complaint was filed. *Id.* at 1322–23 & n.2. The court held that § 1997e(e) applied to suits by prisoners arising while the prisoner was in custody, regardless of whether the prisoner was released prior to filing the suit. *Id.* at 1327. But it only dismissed the case *without* prejudice, and held: "If a member of the plaintiff class later develops a disease caused by the exposure to asbestos, that person would then appear to be able to satisfy the physical injury requirement of § 1997e(e)." *Id.* at 1320, 1327, 1135. Respondents' portrayal of *Turner v. Grant County, Det. Ctr.*, No. 05–148–DLB, 2008 WL 821895 (E.D. Ky.

III. RULE 23(B)(3)'S PREDOMINANCE REQUIREMENT APPLIES TO PRISONER CONDITIONS OF CONFINEMENT CASES

Respondents call Petitioners' argument "nonsense," but yet they do not dispute that: (1) their claims involve multiple conditions of confinement, the exposure of which depended on the facts, circumstances, and length of each class member's transport; (2) whether a class member's exposure to a particular condition amounts to a constitutional violation depends on the duration of the exposure; and (3) despite the many individual factual and legal determinations that are necessary to determine whether the conditions of the class member's transport violated their constitutional rights, the district court certified the class based on a single common question. They also do not explain how this single question, which involves just one condition ("sleep overnight"), can resolve the constitutionality of any of the other conditions (e.g., inadequate food, water, and exercise).[7]

Mar. 26, 2008) is also inaccurate. In addressing the "management" element of Rule 23(b)(3), and discussing the difficulties in managing the particular class action, the court noted: "PLRA issues would once again surface if the class were to include present inmates seeking monetary damages under circumstances where physical injury was not evident." *Id.* at *20. The court then turned to the "predominance" element, and did not feel it necessary to engage in a "[p]rotacted analysis" of *that* element (not the PLRA issue) because individual fact-finding clearly predominated common issues of fact and law. *Id.*

[7] Perhaps even more frustrating than the district court's holding is the fact that Respondents never alleged a deprivation of sleep as a basis for class liability in their complaint. They only alleged that they were "unable to lie down or stand up for more than 24 hours." (Pet. App. 43a, 52a.) And even this was not alleged to be a fact common to the class. (*Id.*) The question of law allegedly common to the class was whether transporting "in

Like the district court did, Respondents ignore the predominance requirement altogether. Not surprisingly, all but one of the cases they cite in support reference Rule 23's commonality element.[8] And none of them involve various constitutional violations based on multiple conditions of confinement.[9] Because of the individualized nature of conditions of confinement claims, the predominance requirement must be closely scrutinized, not brushed aside under the guise of "minor variations in inmates' experiences." It is these "variations" that dictate whether a violation has even occurred. On each transport, there were undoubtedly variations in the amount and type of food and water provided, the number of bathroom breaks afforded, and the amount of exercise

---

metal cages, wearing handcuffs, shackles, and wrist restraints, unable to lie down or stand up for more than 24 hours at a time" was unconstitutional. (*Id.*) The "rest over night" allegation was not even raised in the motion for class certification to support either commonality or predominance. It was first raised in Respondents' reply to that motion, and formed the basis for the district court's ruling. Respondents now embrace it as the driving force behind their class action: "Respondents have challenged Petitioner TransCor's system-wide policies and practices that deprive inmates of rest in a bed for more than 24 hours." (Brief in Opposition at 18.) The other challenged conditions are simply slipping in the back door.

[8] The exception, *Casale v. Kelly*, 257 F.R.D. 396, 401 (S.D.N.Y. 2009), was not a prisoner conditions of confinement case. Furthermore, *Hagan v. Rogers*, 570 F.3d 146, 158–59 (3rd Cir. 2009) did not address Rule 23(b)(3), and *J.D. v. Nagin*, 255 F.R.D. 406, 411 (E.D. La. 2009) was a class action certified under Fed. R. Civ. P. 23(b)(2).

[9] Respondents randomly attack three cases cited by Petitioners, but they do not advance their own argument in doing so. Notably, Respondents do not even address the most significant case on this issue—*Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997).

available. Simply because a prisoner was on a transport for more than 24 hours does not mean that he was exposed to the same conditions as every other class member. The individual inquiries inherent in these types of cases, particularly when each condition serves as a separate basis for liability, overwhelmingly predominate questions that are common to the class. No single question can resolve them on a class-wide basis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL P. STRUCK *
EILEEN DENNIS GILBRIDE
NICHOLAS D. ACEDO
JONES, SKELTON &
HOCHULI, P.L.C.
2901 North Central Avenue,
Suite 800
Phoenix, AZ 85012
(602) 263-1700
DStruck@Jshfirm.com

* Counsel of Record

Counsel for Petitioners

January 19, 2011